(1) Supreme Court, U.S.
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In The

Supreme Court of the United States

I&M RAIL LINK,

Petitioner,

v.

NORTHSTAR NAVIGATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Truman-Hobbs Act (the "Act"), authorizes the Coast Guard to order bridge owners to alter bridges when they "unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. §§511-524. The Act was adopted to provide federal funding for the reconstruction of railroad bridges.

A separate federal statute, also administered by the Coast Guard, authorizes the location and the precautionary warnings for all stationary objects that obstruct navigation, including bridges. 33 U.S.C. §401. The bridge involved in this case was duly authorized and was constructed in accordance with the permits issued pursuant to this statute. On May 5, 1996, a marine vessel pushing twelve barges approached the Sabula Bridge at an angle and hit the open bridge in full daylight.

The issue presented is:

Whether findings made to support Truman-Hobbs Act funding should invalidate the legal authority to occupy space in navigable waters which is otherwise granted by a Coast Guard permit, thereby transferring the obligation to avoid bridge-vessel allisions away from river pilots and marine vessels and placing that obligation on bridge owners who have no ability to control navigational safety.

RULE 29.6 DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that it is a Delaware Limited Liability Company that is wholly owned by I & M Holdings, LLC, also a Delaware Limited Liability Company, and the Soo Line Railroad Company, Inc., a Minnesota Corporation. No publicly traded company directly owns 10% or more of the petitioner's stock. However, the Soo Line Railroad Company is wholly owned by the Canadian Pacific Railway Company, which is a publicly owned company in Canada.

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The opinions of the Court of Appeals for the Seventh Circuit, that first reversed the district court, and then denied the petition for rehearing, are reported at 198 F.3d 1012 (7th Cir. 2000) and 205 F.3d 333 (7th Cir. 2000) respectively. The opinion of the United States District Court, Northern District of Illinois, Western Division, granting summary judgment in favor of Petitioner, was not published but is included in Appendix A at 1 and 2. The opinion of the United States District Court, Northern District of Illinois, Eastern Division, addressing personal jurisdiction and venue issues, is reported at 21 F. Supp. 2d 849 (N.D. Ill. 1998).

JURISDICTION

The court of appeals issued its Opinion on January 5, 2000. On January 19, 2000, petitioner filed a Petition for Rehearing En Banc. United States Court of Appeals denied the request for a hearing on February 25, 2000. The Court's jurisdiction is invoked pursuant to 28 U.S.C. §1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

33 U.S.C. §401

> §401. Construction of bridges, causeways, dams or dikes generally; exemptions
>
> It shall not be lawful to construct or commence the construction of any bridge . . . over . . .

any . . . navigable river . . . of the United States until the Consent of Congress to the building of such structures shall have been obtained and until the plans for (1) the bridge . . . shall have been submitted to and approved by the Secretary of Transportation. . . . When plans for any bridge or other structure have been approved by the Secretary of Transportation or by the Chief of Engineers and Secretary of the Army, it shall not be lawful to deviate from such plans either before or after completion of the structure unless modification of said plans has previously been submitted to and received the approval of the Secretary of Transportation or the Chief of Engineers and the Secretary of the Army.

33 U.S.C. §511. Definitions

* * *

The term "bridge" means a lawful bridge over navigable waters of the United States, including approaches, fenders, and appurtenances thereto, which is used and operated for the purpose of carrying railroad traffic, or both railroad and highway traffic, or if a State, county, municipality, or other political subdivision is the owner or joint owner thereof, which is used and operated for the purpose of carrying highway traffic.

33 U.S.C. §512. Obstruction of navigation

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

33 U.S.C. §513. Notice, hearings, and findings

Whenever any bridge shall, in the opinion of the Secretary, at any time unreasonably obstruct such navigation, it shall be the duty of the Secretary, after notice to interested parties, to hold a hearing at which the bridge owner, those interested in water navigation thereunder or therethrough, those interested in either railroad or highway traffic thereover, and any other party or parties in interest shall have full opportunity to offer evidence and be heard as to whether any alteration of such bridge is needed, and if so what alterations are needed, having due regard to the necessity of free and unobstructed water navigation and to the necessities of the rail or highway traffic. If, upon such hearing, the Secretary determines that any alterations of such bridge are necessary in order to render navigation through or under it reasonably free, easy, and unobstructed, having due regard also for the necessities of rail or highway traffic thereover, he shall so find and shall issue and cause to be served upon interested parties an order requiring such alterations of such bridge as he finds to be reasonably necessary for the purposes of navigation.

33 U.S.C. §516. Apportionment of cost

At the time the Secretary shall authorize the bridge owner to proceed with the project, as provided in section 515 of this title, and after an opportunity to the bridge owner to be heard thereon, the Secretary shall determine and issue an order specifying the proportionate shares of the total cost of the project to be borne by the United States and by the bridge owner. Such

apportionment shall be made on the following basis: The bridge owner shall bear such part of the cost as is attributable to the direct and special benefits which will accrue to the bridge owner as a result of the alteration, including the expectable savings in repair or maintenance costs; and that part of the cost attributable to the requirements of traffic by railroad or highway, or both, including any expenditure for increased carrying capacity of the bridge, and including such proportion of the actual capital cost of the old bridge or of such part of the old bridge as may be altered or changed or rebuilt, as the used service life of the whole or a part, as the case may be, bears to the total estimated service life of the whole or such part: Provided, That in the event alteration or relocation of any bridge may be desirable for the reason that the bridge unreasonably obstructs navigation, but also for some other reason, the Secretary may require equitable contribution from any interested person, firm, association, corporation, municipality, county, or State desiring such alteration or relocation for such other reason, as a condition precedent to the making of an order for such alteration or relocation. The United States shall bear the balance of the cost, including that part attributable to the necessities of navigation: And provided further, That where the bridge owner proceeds with the alteration on a successive partial bid basis the Secretary is authorized to issue an order of apportionment of cost for the entire alteration based on the accepted bid for the first part of the alteration and an estimate of cost for the remainder of the work. The Secretary is authorized to revise the order of apportionment

of cost, to the extent he deems reasonable and proper, to meet any changed conditions.

33 C.F.R. §114.10 General policies on issuance of permits and drawbridge operation regulations.

* * *

The decision as to whether a bridge permit or a drawbridge operation regulation will be issued or promulgated must rest primarily upon the effect of the proposed action on navigation to assure that the action provides the reasonable needs of navigation after full consideration of the effect of the proposed action on the human environment.

* * *

STATEMENT OF THE CASE

The facts of this case are uncomplicated and undisputed. Petitioner owns a short line railroad located in the States of Illinois, Iowa, Wisconsin, Minnesota and Missouri. Petitioner's rail line includes the Sabula Railroad Bridge, at milepost 535, which is a swing span bridge that crosses the upper Mississippi River. Respondent is a barge line that operates commercial towboats, including one named the Motor Vessel Megan Beesecker, on the upper Mississippi River. On May 5, 1997, the Megan Beesecker struck the Sabula Railroad Bridge in broad daylight as it attempted to pass through its open channel when descending the river.

At the time of the accident, the bridge was in clear view and had been properly permitted by the U.S. Coast Guard on April 25, 1996, pursuant to the U.S. Coast Guard's permit process under 33 U.S.C. §401. The factual

situation of a moving vessel colliding with a stationary bridge, which admirality cases call an allision, gives rise to a presumption that the stationary object was not at fault and that the moving vessel caused the allision. *The Oregon*, 158 U.S. 186, 15 S.Ct. 804 (1895). Under admiralty law, this presumption is commonly referred to as the *Oregon Rule*. When the stationary object is in compliance with its Coast Guard permit, this rule has been applied to protect stationary objects, which have no control over safety at the scene of the accident and frequently cannot even produce an eyewitness to the allision.

On June 17, 1996, the Coast Guard issued an "Order to Alter" the Sabula Bridge pursuant to its authority under the Truman-Hobbs Bridge Act. 33 U.S.C. §§511-23. The Truman-Hobbs Act gives the U.S. Coast Guard the ability to regulate the alteration of bridges located in navigable waters and provides federal funding for railroads whenever the removal or alteration serves the benefit of the public and marine traffic rather than the railroad. As required with Truman-Hobbs bridge inquiries, on September 25, 1995 the Coast Guard prepared a report regarding the Sabula Railroad Bridge that recommended the bridge's two separate channels be combined into one large channel. The Seventh Circuit held that the findings in this Report (*i.e.*, that the bridge qualifies as an "unreasonable obstruction to navigation"), were "more than adequate to overcome the *Oregon's* presumption." (App. 8) The Appellate Court made this ruling despite the fact that the Coast Guard issued a permit accurately charting the position of the bridge on the Mississippi River and expressly authorizing, pursuant to

33 U.S.C. §401, its continued existence in its current condition as of April 26, 1996, six months after the report dated September 25, 1995. (App. 2, 3)

The "Order to Alter" did not set forth any date for completion of the alterations. The Bridge Administrator of the Eighth Coast Guard District, by direction of the District Commander, confirmed on May 1, 2000, that the existing bridge permit issued on April 26, 1996 " . . . is valid and there is no action pending that requires a permit amendment."[1] Thus, there is no dispute that the bridge was duly licensed and permitted both before and after the Truman-Hobbs Act findings. The Coast Guard has not yet requested petitioner to make any alterations to the bridge.

The district court had jurisdiction over the original action pursuant to the court's admiralty and maritime jurisdiction, pursuant to 28 U.S.C. §1333(1). Petitioner filed a motion for summary judgment, based upon the *Oregon Rule*, claiming that there was no genuine issue of material fact as to liability in that respondent failed to rebut the presumption in favor of the stationary bridge. On April 21, 1999, the district court entered an order granting summary judgment as to liability based upon its finding that, after reviewing all the evidence presented, respondent failed to present evidence that it acted with reasonable care when navigating the Sabula Bridge and that the bridge was in full compliance with its permit. (App. 10, 11)

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[1] The Bridge Administrator that signed the May 1, 2000 letter was the same individual who signed the order to alter dated June 17, 1996.

The court of appeals reversed the district court's order granting summary judgment in favor of petitioner. Giving no deference to the Coast Guard permit or attaching any legal significance to the fact that the bridge was an authorized obstruction constructed in full compliance with a Coast Guard permit at the time of the allision, the Court below relied solely upon the Truman-Hobbs Act report as "more than adequate to overcome *The Oregon's* presumption." (App. 8)

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals in this case profoundly undermines the century-old rules that have governed bridge owners' and boat operators' responsibilities for promoting safe navigation on waters subject to the federal government's plenary authority. One effect of the holding below will be to seriously impair safety on navigable waters by weakening the boat operator's absolute duty to avoid allisions with a bridge. A second effect will be an explosive increase in federal court litigation. Heretofore, it has been understood that the barge operator bore liability for allisions on structures that had received federal permits. Now the barge operators have a new defense that will require costly litigation under unclear federal common law standards. The costs to litigants and federal courts will be significant. These untoward effects are alone sufficient to warrant review by this Court. The fact that the court of appeals created this situation by modifying settled common law standards without any evidence that Congress clearly intended that outcome makes review by the Court absolutely vital.

There are currently thirteen bridges throughout the United States with a Truman-Hobbs Act "Order to Alter" pending. On average, these bridges have been waiting for federal funds for over five years. Only eight of these railroad bridges have received any funds for design or construction and not one of these projects has been fully funded. The Sabula Bridge project has not received any funding at this time. Over the past ten years, there have been approximately 2,000 documented allisions at these bridges. As a general rule, in the absence of active negligence on the part of bridge owners, the *Oregon Rule* applied to each of these allisions, and indeed was applied by the trial court in this case. Reversing the district court, the court of appeals altered this long-standing liability principle of admiralty law for passive structures, thereby setting rules of civil responsibility which will disrupt the Coast Guard's regulation of marine traffic, thwart the true purpose of the Truman-Hobbs Act and potentially endanger vital train service.

The legislative history does not indicate that the Truman-Hobbs Act was intended to change admiralty's common law. The clear purpose of the Truman-Hobbs Act was to relieve the railroads from the harsh and undue financial burden of paying for capital improvements to improve bridges for marine traffic. The Act attempts to balance the interests between two competing modes of transportation – rail and marine traffic – by relieving one mode of the duty to subsidize the other. That balance was successfully maintained for 59 years, but was suddenly and improperly disrupted by the Seventh Circuit's opinion.

The decision of the court of appeals not only deviates from the intent of the Truman-Hobbs Act but also creates an environment that discourages safe navigational practices, which will inevitably increase damage to bridges, marine traffic, marine cargo and personal injury to seamen. The need for judicial guidance from this Court is immediate. There will be hundreds of allisions at Truman-Hobbs Act bridges every year. The issue of civil liability associated with Truman-Hobbs Act funding is one of exceptional national importance affecting this nation's navigable waterways, and its rail and marine transportation systems.

I.

Because Most Allisions in the Western Waterways Involve Truman-Hobbs Act Bridges, the Seventh Circuit's Decision Causes a Profound Reversal of the Rules of Admiralty Law With Harmful Consequences

Foreseeable implications of the ruling below will eviscerate the Rule of *The Oregon* in all Truman-Hobbs situations, and will have profound effects upon safety in the navigable waters of the United States, most particularly in the upper Mississippi River. For example, the six bridges that qualified for federal funding under the Truman-Hobbs Act along the upper Mississippi River were involved in 73% of the allisions ocurring in that navigable waterway.

Allisions on the Upper Mississippi River
1976 – 1996
(From Cairo, Missouri – North)

	Number	Number of Allisions	Percentage of Allisions
Qualified Bridges	6	1,353	73%
Other Bridges	18	499	27%
Total Bridges	24	1,852	100%

Throughout the Coast Guard's entire Western River Operations area, there are eight qualified bridges. These eight bridges account for 52.4% of the allisions on the navigable waterways in the Western River Operations area as follows:

Allisions on the Western River Operations
1976 – 1996

	Number	Number of Allisions	Percentage of Allisions
Qualified Bridges	8	2,300	52.40%
Other Bridges	48	2,064	47.60%
Total Bridges	56	4,364	100.00%

Because the court of appeals considered and applied the Truman-Hobbs Act as if it were a navigational statute, rather than a funding statute, mariners and barge lines will hereinafter seek to invoke the rule set forth in *The Pennsylvania*, 86 U.S. 125, 19 Wall. 125 (1873). This rule, like the rule of *The Oregon*, is a long-standing principle of admiralty law. Under the rule of *The Pennsylvania*, a stationary object that is found to be in violation of a navigational statute is automatically presumed to be at fault for any allision. However, the rule does not only require a

presumption with regard to liability – the rule also presumes causation of the resulting accident. The rule of *The Pennsylvania* imposed presumptive, strict liability on the stationary object unless it can be proved that the statutory violation "could not have contributed" to the accident. *In Re Wasson*, 495 F.2d 571, 580 (7th Cir. 1980).

In the case of railroad bridges, the hazard which compels certification for federal funding under the Truman-Hobbs Act is essentially the same hazard – a narrow channel which dates back to early years of railroad construction which no longer fully meets the growing needs of navigation.[2] Applying common sense, any allision at a bridge can be attributed, at least in part, to the relative narrowness of the navigational channel under the bridge. Thus, applying the rule of *The Pennsylvania* would entirely reverse the presumption of liability established by the rule of *The Oregon* for approximately half of all allisions throughout the navigable waterways of this nation. Under the rule of *The Pennsylvania*, the stationary object, not the mobile marine vessel, would hereinafter be presumed to be liable and be forced to pay for all consequential losses due to allisions.

In addition to the threat of strict liability resulting from the rule of *The Pennsylvania*, the owners of qualified bridges have lost any hope of reliance upon the rule of *The Oregon* in future allision disputes. The rule of *The Oregon* is not an anachronism; it is a necessary and important part of the regulation of river traffic. The rule operates much like the principle of *res ipsa loquitur* in that it is

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[2] Marine vessels have become more powerful, pushing more barges with larger capacity thereby making navigation through bridges more difficult than with fewer smaller barges.

a common sense standard that attributes responsibility to the party who exclusively controlled the instrument of harm. The rule recognizes that a stationary and charted object located in a navigable waterway on any given day has no alternative but to be what it is – a stationary object occupying one well-known location. By contrast, the river pilot controls the number of barges being shoved, the size of the tugboat, the tonnage of the loads, the speed of approach, the horsepower of the engine, the use of a helper tug, the decision to reverse and go upstream, and so on. The rule of *The Oregon* puts teeth in the general principle that river pilots are absolutely required to know the currents and the effect of wind on their tows, and they are absolutely expected to traverse the known difficulties of the river without causing harm. *The Louisiana*, 70 U.S. 164, 173, 3 Wall. 164 (1865) and *Illinois Constructors Corp. v. Logan Transportation*, 715 F. Supp. 872, 888 (N.D. Ill. 1996). Anything less than this time-honored expectation of precise navigation will tend to erode the skill of marine pilots and inevitably result in an increase in accident frequency and severity.

From a pragmatic standpoint, the rule of *The Oregon* has been the saving grace for stationary objects. In many cases, the owner of the stationary object has no witnesses to the accident; indeed, even if a bridge tender is present, he or she rarely has any knowledge as to the reason for the allision. Moreover, river pilots and captains comprise a notoriously phalanxed joint interest group, and therefore as a rule, no pilot will provide testimony of fault against another pilot especially in favor of a railroad. In short, when a stationary object is hit, all the witness testimony, all the expert testimony, and the litigation advantages attendant thereto fall squarely in the camp of

the marine lines, which controlled everything and everyone in the vicinity of the nautical approach. The rule of *The Oregon* levels the playing field by application of a legal presumption that is solidly based upon plain common sense.

As a result of the rule of *The Oregon*, barge lines limit the number of barges in each tow during high water periods and train pilots meticulously to navigate through a bridge's draw safely. In the wake of this decision, a barge line whose pilot negligently strikes a Truman-Hobbs Act bridge will consider itself responsible for *none* of the damage caused to the bridge and its protections. A Truman-Hobbs Act qualified bridge might be out of service for weeks or more and the railroad owner will be unable to seek any settlement from the responsible barge line. On the contrary, the barge line will foreseeably assert a right to collect 100% of the damage to its barges and cargo, relying on the rule of *The Pennsylvania*. All of this will be based on the completely illogical legal assumption that a passive, stationary bridge can be "at fault" and can cause an allision, even though the bridge itself was properly built, charted and duly permitted by the U.S. Coast Guard. Thus, responsibility for safety will shift out of the hands of those persons on the river who have the ability to effectuate compliance with safe navigational practices and will shift into the hands of persons who have no control over navigational safety.

Considering the overall number of allisions involving these particular railroad bridges, the economic and safety consequences become apparent. Assuming that the next ten years will mirror the safety record of the last ten years, there will be the potential for over two thousand "new" federal lawsuits filed on behalf of marine lines

against bridge owners, claiming damages for allisions at the qualified bridges. Instead of the economic burden of these allisions being borne by the marine mode of transportation, which controls the vessels which strike the bridges, these suits will argue that the burden is transferred to the railroad mode of transportation because the bridges are "unreasonable hazards to navigation." With no control over the necessary federal funding and no ability to act without the direction of the Coast Guard, the railroads will not be able to take any actions whatsoever to improve marine safety or to avoid future allisions. Moreover, mariners will have no incentive to undertake the careful training, the heightened care, and the extreme precautions that are appropriate in the vicinity of these older structures. It is therefore highly likely that there may be many *more* than the historical quantity of 2,000 plus hits at the qualified bridges in the next decade. The consequential interruption of rail service, economic impacts on small and medium railroad operators, and wholesale injustice on the navigable waterways of this country would create a chaotic nautical environment, especially on the upper Mississippi River, that only review by this Court can prevent.

II.

Because Safety on the Waterways is Controlled Under Section 401 (Permitting), the Unprecedented Construction of Section 512 as a Safety Statute Disrupts the Coast Guard's Regulation of Safety on the Waterways

The current dispute requires the reconciliation of two sections of Chapter 33 of the United States Code, both of which are administered by the U.S. Coast Guard. The first

is Section 401, which requires the consent of Congress and approval by the Secretary of Transportation for all plans prior to the construction or modification of any bridge over a navigable waterway. Pursuant to this statute, the Coast Guard studies proposed and existing bridges over the nation's navigable waters and issues permits for approved structures which prescribe its exact location, its permitted dimensions, and other safety and precautionary characteristics. 33 C.F.R. §§114.01 *et seq.* Specifically, "[t]he decision as to whether a bridge permit . . . will be issued . . . must rest primarily upon the effect of the proposed action on navigation to assure that the action provides the reasonable needs of navigation after full consideration of the effect of the proposed action on the human environment." 33 C.F.R. §114.10.

The second section of Chapter 33 which must be reconciled with Section 401 is Section 512 of the Truman-Hobbs Act. This statute was passed 41 years after the permitting statute and was described by Congress as a measure intended to provide reasonable funding for railroad bridge renovations. (*See* Argument III, below.) Prior to any bridge being considered for funding under this statute, it must be a "lawful bridge" as set forth in 33 U.S.C. §511. The statute also requires the Coast Guard to hold public hearings in connection with any bridge that, in the opinion of the Secretary, at any time unreasonably obstructs navigation. 33 U.S.C. §513. The public hearing serves the purpose of providing a full opportunity for the bridge owner and any other interested parties to "be heard as to whether any alteration of such bridge is needed, and if so, what alterations are needed, having due regard to the necessities of the rail . . . traffic." *Id.* This hearing has historically been non-adversarial

because the bridge owner is at worst indifferent to reconstruction, and in most cases realizes some benefit from the assistance of federal funding. After the public hearing, if the Coast Guard "determines that any alterations of such bridge are necessary in order to render navigation through or under it reasonably free, easy, and unobstructed, . . . [it] shall so find and shall issue" an order requiring such alterations. 33 U.S.C. §513. This decision will be accompanied by a report, required under the Truman-Hobbs Act, with supporting written analysis, including a cost benefit ratio. 33 C.F.R. §116.3.

The Sabula Bridge had reached this point in the administrative process at the time of the collision, and it remains at this point today. There are 13 qualified bridges that are awaiting reconstruction, none of this reconstruction has been fully funded. The next step in the process is that the Coast Guard itself initiates renovation activity when funding becomes feasible. 33 C.F.R. §116.40. In correspondence from the Coast Guard, dated May 2, 2000, the Truman-Hobbs process was explained as follows:

> Enclosed is the current list of Truman-Hobbs Bridges, which have received the Coast Guard's Order to Alter. From that list, the Coast Guard initiates alterations (design or construction) depending upon availability of funding appropriated by Congress for a specific bridge during each fiscal year.

Many years may elapse before funding is successfully appropriated and the bridge is redesigned, respecified, repermitted and finally rebuilt. Of the structures which are now subject to an "Order to Alter" from the Coast Guard, most have been subject to that order for at least five years. *See, e.g., In re Great Lakes Towing v.*

Motorship Boku Maru, 384 F. Supp. 549 (N.D. Ill. 1972), *aff'd sub nom.*, 505 F.2d 579 (7th Cir. 1974) (14 years).

The Seventh Circuit in this case construed both Section 512 and Section 401 as navigational statutes, concluding that Coast Guard findings submitted under Section 512 serve to negate legal presumptions that arise from a valid permit. Even though the Sabula Bridge was then, and is now, a structure sanctioned by the Coast Guard under Section 401, the Seventh Circuit ruled that the same agency's findings under Section 512 defeated the rule of *The Oregon*. As discussed in Argument I. above, this ruling potentially leads to a reversal of the governing presumptions whenever a qualified bridge is involved in an allision.

For the last 59 years, there has been absolute clarity under the rule of *The Oregon* that a permitted and charted structure was a legal and approved object, even though all such structures obviously constitute an obstruction to navigation. For example, a structure that conformed to its permit could not be characterized as a "negligent" structure under admiralty law. *Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037, 1049-50 (7th Cir. 1995). The decision below has now reversed this body of law. Thus, even though Truman-Hobbs Act bridges conform to their permits, they cannot claim the benefit of any presumption and will be attacked as being an "unreasonable obstruction" for purposes of civil litigation. It will be extremely difficult for any bridge owner to win an allision case under those circumstances regardless of the navigational facts.

The lower court's construction of these two statutes will lead to intense administrative confusion and to

haphazard assessments of liability for future allisions. First, the Coast Guard's administrative proceedings under the Truman-Hobbs Act will become adversarial for the first time in history. Owners will vigorously oppose initiation of the process and will contest the Coast Guard's procedure because they will not want their bridge to be labeled by the Coast Guard as an "unreasonable obstruction to navigation" because of the maritime litigation consequences. Second, the Coast Guard will be forced to contradict itself. The agency will be issuing legal permits for bridge structures that it has legally pronounced to be "unreasonable obstructions to navigation." Juries and judges will weigh these self-contradictory agency pronouncements and will reach inconsistent interpretations of their relative meaning and legal consequences in civil cases.

The confusion will extend to the agency's day-to-day regulation of navigation on the waterways. A significant portion of the Coast Guard's duties involve the investigation of each nautical accident and the imposition of fines and sanctions for violations of safe navigational practices. Hundreds of these investigations will occur at qualified bridges in the next few years. In this regard, the Coast Guard has historically and unbendingly taken the position that a skilled mariner should be able to avoid an allision with a stationary object which has been properly permitted and clearly located on a Coast Guard map. This is consistent with the legal principle that pilots are required to know the effect of winds and currents on their vessels. *Illinois Construction Corp. v. Logan Transportation*, 715 F. Supp. at 881. In order to gain relief from his or her responsibility to maintain control of the moving vessel, the pilot must demonstrate intervening weather

conditions involving hurricane force winds and must show that these conditions could not have been foreseen or anticipated by the navigator. *Boudoin v. J. R. McDermott & Co.*, 281 F.2d 81, 87 (5th Cir. 1960) and *Patapsco Scrap Corp. v. Maryland Shipbuilding & Drydock, Co.*, 268 F.2d 817, 818 (4th Cir. 1959).

The wholesale transposition of allision responsibility from moving vessels to stationary objects will disrupt the Coast Guard's regulatory scheme. At all further investigations, pilots and captains will contest and appeal Coast Guard findings of pilot error on the grounds that the bridge was an "unreasonable" obstruction. Therefore, the marine lines will argue that the pilot was acting "reasonably."

Courts have recognized that in many arenas safety compliance is enforced by economic motivations. For example, the doctrine of products liability was judicially formulated because of the recognition by legal scholars of the essential connection between foreseeable cost and safety enforcement. In the groundbreaking legal opinions which created the theory of products liability, the courts noted that the makers of products profited from their sale, and that the motivation to manufacture safer products could only be created by transferring the cost of injuries to the product manufacturers. *Cappellini v. McCabe Powers Body Co.*, 713 F.2d 1, 7 (2nd Cir. 1983) and *Greenman v. Yuba Power Products*, 377 P.2d 897, 901 (Ca. 1963). In the current matter, this logical approach has been turned directly on its head. The overall effect of the lower court's ruling is to transfer some and perhaps all economic responsibility for allisions away from pilots and barge lines, who navigate the rivers and the waterways of this country. Thus, responsibility is shifted away

from those who can take active steps to avoid future allisions and transferred instead to bridge owners, who face assessments not only for the cost of repairing their own bridges, but also may be forced to reimburse marine traffic for vessel damage, lost cargo, down time, and other marine transportation expenses. The obvious problem with this interpretation of the statutory scheme is that it delegates the duty to enforce navigational safety rules to persons who have absolutely no ability to influence navigational safety in any way. Bridge owners cannot control any vessels on the river; they cannot train pilots in safe approaches; they cannot instruct captains to use a helper tug, or to employ safer techniques. In short, the bridge owner cannot affect navigational safety.

The case at bar is a typical example of the need to impose the navigational safety obligations firmly on the mariners. On May 5, 1996, the bridge at Sabula was opened as soon as the M/V Megan Beesecker backed into the river approximately one and one-half miles above the bridge. The pilot of the M/V Megan Beesecker decided that, despite gusty winds that day, he would proceed downstream without a helper tug. Moreover, he *added* three barges to his tow immediately above the bridge. When gusty winds began to blow his tow off course, he continued his approach to the bridge rather than back upstream in order to realign the tow.

The bridge owner had no influence over any of these crucial decisions. The bridge remained passive, stationary, and unchanging throughout the 40-minute approach to the bridge. Under the principles enunciated by the court of appeals below, the federally qualified bridge can no longer rely on the presumptions established by *The Oregon* rule. Under the lower court's ruling, the passive

bridge will apparently be labeled as "unreasonable" to the trier of fact, and the barge owner will argue that the bridge is presumptively at fault for the entire collision.

The Coast Guard's regulations seek to enforce safety primarily by controlling the conduct of mariners. The Coast Guard has been understandably adverse to placing responsibility for navigational safety on the owners of unthinking, accurately charted stationary objects that comply with valid permits. The lower court's construction of the relevant statutes puts Section 512 in direct conflict with Section 401 and contradicts the agency's overall scheme governing the regulation of safety on American waterways.

III.

The Court of Appeals' Decision Defeats the Legislative Purposes of the Truman-Hobbs Bridge Act of 1940 and Disrupts the Balance Established Between Two Competing Modes of Transportation

The purposes of the Truman-Hobbs Act are clearly enunciated in its colorful legislative history. As noted by Congress, the purpose of the legislation was (i) to protect railroad bridge owners from paying for alterations to their bridges that will benefit marine lines but not rail transportation; and (ii) to protect bridges from abandonment in order to maintain rail service to all possible communities and to promote the national defense. 86 Cong. Rec. 8647 (1940).

Congress was especially concerned that the railroads should not be compelled to pay for capital improvements

which served to benefit their own competitors. Congressmen noted that ships carrying cargo on the river are in direct competition with the railroads who own the bridges.

> The navigable stream is publicly owned; the highway is publicly owned, including its bridges. The railroad is privately owned, but acquires its right to construct the bridge because it serves public transportation. The commercial carrier, whether on the highway or on the river or on the rails, is not publicly owned, but is a privately owned carrier. Transportation, whether on water, highway, or rails is paid for by the shipping public. The public owns the highway, but it does not own the commercial vehicles that haul the freight. The public owns the river, but it does not own the private ship that carries its freight for hire.
>
> A railroad company desires to build a line to transport freight for the public. It gets a permit from the War Department and constructs its bridge to conform to the specifications required by the Secretary of War. The Secretary makes those specifications to meet the needs of vessels using the watercourse. In subsequent years a steamship company comes along and wants to widen the channel or raise the clearance of the bridge, or change its location. The steamship company wants to do that to aid its transportation business, probably as a competitor of the railroad owner of the bridge. The railroad company, by the agent of the Government, is ordered to make whatever alteration is required at an expense of $1,000 or $100,000, without any contribution from anybody benefited by the alteration. 86 Cong. Rec. 8647 (1940).

Each time the marine industry builds a bigger ship to carry more cargo, the federal government has the right to require railroads to alter their bridges to accommodate the increased size of shipping. In the absence of the Truman-Hobbs Act, the railroads would have to pay for the enormous cost of bridge reconstruction at their own expense.

In order to protect the financial security of the railroads, Congress ordered that reconstruction costs would be apportioned. Contrary to the suggestion of the court of appeals below, there was no compromise effected whereby the financial support for renovation was balanced by increased liabilities under admiralty law.[3] Nowhere in the legislative record did any member of Congress mention that, with the same legislation, railroads would be subject to additional civil liability under the admiralty laws. The Congressmen went to great lengths to note that it was their intent to *reduce* bridge owner's costs as a result of the "Orders to Alter," not to increase them. The concept that passive bridge owners could someday be liable for allisions, while continuing to be in full compliance with an existing permit, would be

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[3] The Seventh Circuit suggested that the Act was a legislative compromise that exchanged reconstruction funding in return for changes in the law of admiralty stating: "Perhaps the Truman-Hobbs Act as a whole was a concession to bridge owners, a victory for an interest group, but like most statutory packages, it is a complex deal, with some features making life easier for the proponents and other features attaching prices. Here a subsidy comes hand in hand with a finding that the bridge is an unreasonable obstruction to navigation. Such a finding has many consequences; one may be an effect on negligence litigation under admiralty jurisdiction." (App. 5)

inconceivable to the bills' many sponsors and contradicts the central purpose of the Truman-Hobbs Act.

This Court has held that common law rules of liability should not be supplemented by a statute in the absence of specific and clear language in the statute setting forth that intent. *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35, 104 S.Ct. 304 (1983). In *Norfolk Redev. & Hous. Auth.*, this Court held: "It is a well-established principle of statutory construction that the common law . . . ought not to be deemed to be repealed, unless the language of a statute be clear and explicit for this purpose." Since admiralty law is based upon common-law developed over centuries of decisions, this canon of construction specifically applies to the issue in the case at bar. This principle was reaffirmed by this Court in *United States v. Texas*, 507 U.S. 529, 534, 113 S.Ct. 1631 (1993). This Court stated in that case, "In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." Since the Truman-Hobbs Act made no reference to civil liability of bridges due to allisions, the common law of admiralty cannot be replaced by the Seventh Circuit's interpretation of the Truman-Hobbs Act.

The reversal of the rule of *The Oregon* and the potential for wholesale imposition of civil liability on railroads swings the balance of equities dramatically against the railroads and in favor of marine lines. Whereas, the rule at the time of the enactment of the Truman-Hobbs Act (and for 59 years thereafter) was that the railroad bridge owners did not pay for the extensive costs of allisions, the decision below reverses that time-honored precept. The cost of this reversal is significant.

When the Truman-Hobbs legislation was being debated, the prospect of bridge abandonments was specifically discussed as a genuine threat to the national defense. For example, Mr. Hobbs explained to his fellow Congressmen that a bridge owner, due to financial constraints, may prefer to abandon a bridge before undertaking the cost of construction of ordered alterations. The first and foremost reasons given by Mr. Hobbs to support this bill was as follows:

> "First. National defense cannot be made adequate without adequate rail and waterways. The United States is a land of vast distances. No one can predict where there may be a need to concentrate men, munitions and war material. . . . No matter how many tanks and guns, no matter how much ammunition we may manufacture, we must be prepared to haul them where we want them when we want them. A railroad is no better than its bridges. A waterway no better than its clearances." 86 Cong. Rec. 8653 (1940).

This concern with respect to bridge abandonments compels a reversal of the court of appeals ruling below. The liability imposed by the Seventh Circuit potentially exceeds any costs of renovation, and may impel smaller railroads to abandon bridges rather than renovate them.

In addition to the effect on national defense, small spur lines are often the only source of rail service to small communities and rural areas. The looming liability arising from an "Order to Alter" may render rail service to those communities economically infeasible and lead to the abandonment of the line. This will have drastic consequences for those families and industry that rely upon rail transit in these areas. Small railroads, like the I&M,

may be seriously affected by a single big allision or by repeated bridge hits during fast waters or flood conditions. In short, shifting the cost of allisions from marine lines to bridge owners not only is illogical, but also it is economically irrational and will have a destructive impact on the nation's transportation systems.

IV.

The Appellate Court's Decision Creates A Conflict Among the Circuit Courts of Appeals

The Seventh Circuit opinion is in direct conflict with the longstanding authoritative decision of *Seaboard Airline Co. v. Pan American Petroleum & Transport Co.*, 199 F.2d 761 (5th Cir. 1952), *cert. denied*, 345 U.S. 909 (1953), which that holds that an order to alter, issued under the Truman-Hobbs Act, is insufficient to rebut the presumption of *The Oregon* Rule when assessing liability between a moving vessel and a stationary bridge that is in full compliance with a valid permit.[4]

Seaboard Airline R. Co. involved a factual scenario almost identical to the case at hand. Each case involved a properly permitted railroad bridge that was involved in an allision while under a Truman-Hobbs Act order to alter, requiring the width of the navigational channel to be increased.[5] In addition, in neither situation had the

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[4] Decisions of the Fifth Circuit, dated prior to September 30, 1981, are binding on the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206, 1207 (11th Cir. 1981).

[5] Although the Seventh Circuits opinion states that *Seaboard Airline R. Co.* does not mention the "Truman-Hobbs

alterations ordered been initiated prior to the subject allisions. In both cases, the marine vessel attempted to rebut the presumption of the Rule of *The Oregon* based upon the mere existence of the order to alter, which designated the bridge as an "unreasonable obstruction to navigation." In contrast to the Seventh Circuit, the Fifth Circuit ruled as follows:

> When, as the record shows to be the case here, the conditions claimed to be unlawful or negligent are entirely passive and have existed for many years to the knowledge of the moving vessel; when too, the evidence is, as here, uncontradicted that, while these conditions do tend to make the passage more difficult than if they did not exist, a passage can be safely made under the conditions if due care is exercised; there is no basis in the record even for a division of damages in favor of the actively negligent moving vessel, much less for awarding it full damage. *Id.* at 765.

The *Seaboard Air Line R. Co.* court went on to add:

> The undisputed facts as to these matters, however, do not support the finding in law that at the time of the collision the bridge was an unlawful structure, or that its existence was in and of itself negligent so as to authorize recovery in favor of those who bungled and blundered their way into collision with it." *Id.* at 765.

Act," the lower court decision clearly states that the order to alter was issued pursuant to 33 U.S.C. §§511, et seq. (App. 14) *Seaboard Air Line R. Co. v. the Pan Maryland*, 105 F. Supp. 958, 961 (1952).

The U.S. Coast Guard report, relied upon by the Seventh Circuit to rebut *The Oregon* Rule, did not indicate that Sabula bridge was unsafe, only that "significant reductions in speed are required to safely transit the bridge" or, as cited in the Seventh Circuit's decision, passage required "precise navigation." (App. 6) Unlike the centuries of admiralty law to the contrary, the Seventh Circuit found that "precise navigation" and "reductions in speed" are too great a burden to place upon marine traffic. Instead, the decision would open the bridge owner up to potential liability regardless of full compliance with Coast Guard permits.[6]

As a result of this conflict among the circuits, the rules of admiralty will differ depending on where an allision occurs. In fact, different admiralty presumptions will apply to mariners on different parts of the Mississippi River, depending on whether they are in the upper or lower portion. (The lower Mississippi River runs along the border of Fifth Circuit states of Louisiana and Mississippi, while the upper Mississippi, at issue in this case, runs along the border of the Seventh Circuit state of Illinois.) Due to the conflict among the circuits, neither bridge owners nor mariners can accurately predict the

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[6] This Court's opinion is also in conflict with *Texas & P. Railway Co. v. Angola Transfer Co.*, 18 F.2d 18 (5th Cir. 1927), *cert. denied*, 275 U.S. 534 (1927) which found as a matter of law that a bridge built pursuant to the authority of Congress, according to plans and specifications approved by the Secretary of War, afforded the bridge owner complete protection from allegations that the bridge was improperly constructed. *Id.* at 19. Like the case at hand, *Texas & P. Railway Co.* also involved a bridge that was involved in an allision after an order to alter was issued by an administrative body with congressional authority.

law to be applied in the event of an allision at a bridge under a Truman-Hobbs order to alter.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDIX A

I&M RAIL LINK, LLC, Plaintiff-Appellee,

v.

NORTHSTAR NAVIGATION, INC., Defendant-Appellant.

No. 99-2128.

United States Court of Appeals, Seventh Circuit.

Argued Dec. 10, 1999.

Decided Jan. 5, 2000.

Weston W. Marsh (argued), Freeborn & Peters, Chicago, IL, for Plaintiff-Appellee.

James K. Mondl (argued), Tonkin & Mondl, St. Louis, MO, for Defendant-Appellant.

Before EASTERBROOK, ROVNER, and DIANE P. WOOD, Circuit Judges.

EASTERBROOK, Circuit Judge.

The railroad bridge across the upper Mississippi River near Sabula, Iowa, is more than a century old. (The bridge is just south of Savanna, Illinois, where Route 52 crosses the river.) Authorized by the Secretary of War in 1880, built in 1881, and substantially renovated between 1905 and 1908, the bridge has a deck too low for river traffic to pass. Transit is through a pin-connected swingspan, which, when river traffic approaches, rotates 90° on the pivot to produce two channels, each 154 feet wide. The river's shipping channel is 300 feet, so the bridge effects a substantial constriction. To pass the bridge a towboat and its fleet of barges must line up perfectly, even when wind and currents combine to push the assembly off the centerline.

On May 5, 1997, the M/V MEGAN BEESECKER was moving downriver with a tow of 12 barges, arranged 3 across and 4 deep. The tow was 105 feet wide, and the assembly (including the towboat) was 780 feet long and weighed about 21,000 tons. This is a common size; 15-barge fleets (lashed 3x5) also are frequent. Pilot James Jarvis planned to use the western (or Iowa) channel, but a wind from the northwest pushed the tow off its centerline. Jarvis then tried to maneuver the tow through the eastern (or Illinois) channel but entered at an angle, and the barges hit the bridge. Admiralty calls this an allision (distinguished from a collision, in which moving vessels meet). I&M Rail Link, the bridge's owner, filed this admiralty action demanding compensation for the damage to the bridge; Northstar Navigation, which operates the MEGAN BEESECKER, filed a counterclaim seeking compensation for the damage to the barges and towboat. The district court granted summary judgment against Northstar, applying the principle of *The Oregon*, 158 U.S. 186, 192-93, 15 S.Ct. 804, 39 L.Ed. 943 (1895), and *The Louisiana*, 70 U.S. (3 Wall.) 164, 173, 18 L.Ed. 85 (1865), that a vessel is presumptively at fault when it hits a stationary object. Northstar sought to rebut this presumption by arguing that the Sabula Bridge is an unreasonable obstruction to navigation. *See The Pennsylvania*, 86 U.S. (19 Wall.) 125, 22 L.Ed. 148 (1873). The permit, issued in 1880 under what is now 33 U.S.C. § 401, was amended as recently as April 1996, so the Sabula Bridge cannot be condemned out of hand. But 33 U.S.C. § 512, which provides that "[n]o bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States", applies to all bridges, not just those

built without permits. The Coast Guard, which today administers both § 401 and § 512, *see* 49 C.F.R. § 1.46(c)(3), (5), has found that the Sabula Bridge unreasonably obstructs navigation because its channels are too narrow. A report issued late in 1995 sums up:

> The horizontal opening of 154 feet does not provide adequate clearance for contemporary commercial tows. This leaves about 24 feet of clearance on each side of the tow when transiting the bridge. This requires commercial tows to be perfectly aligned with the opening when approaching and transiting the bridge to avoid contacting the bridge. This is not what the navigational characteristics of the waterway dictate. If the bridge provided adequate horizontal clearance, tows transiting this reach of the river would assume the angular characteristics required of a turn. A standard tow would occupy a width of at least 172 feet in order to steer the turn through the railroad bridge.

The permit requires the owner to renovate or even remove the Sabula Bridge if necessary to permit unhindered movement on the river. On June 17, 1996, the Commandant of the Coast Guard took action based on the 1995 report. The Commandant "determined that the [Sabula Bridge] is an unreasonable obstruction to navigation" and directed its owner to reconstruct the bridge so that

> The movable span shall provide a horizontal clearance of no less than 300 feet measured normal to the channel and a vertical clearance of no less than 52 feet above the two percent flowline or 60 feet above normal pool, whichever is greater, in the open position and 6 feet above

> the two percent flowline or 18 feet above normal pool in the closed position. These clearances are necessary for the reasonable needs of navigation.

This order was issued more than ten months before the MEGAN BEESECKER and her tow struck the Sabula Bridge. Yet to this day I&M Rail Link has neither sought judicial review of the Commandant's order nor taken the first step to comply with it (which, according to 33 U.S.C. § 514, is the preparation and submission of a plan to alter the bridge).

In the district court, I&M Rail Link argued that the Coast Guard's finding that the Sabula Bridge is an unreasonable obstruction to navigation should be ignored, because § 512 is part of the Truman-Hobbs Bridge Act of 1940, 33 U.S.C. §§ 511-23. An order issued under this Act leads to a cost-sharing proceeding, and the United States has promised to bear part of the reconstruction expense "attributable to the necessities of navigation." 33 U.S.C. § 516. The district court agreed with I&M Rail Link's position that the only significance of the Commandant's order (and the findings on which it was based) is to facilitate a draw on the Treasury. On this interlocutory appeal under 28 U.S.C. § 1292(a)(3) from the grant of summary judgment to I&M Rail Link, the principal question is whether the district court's understanding of the Coast Guard's report and decision is correct.

All bridges with piers in the water or decks lower than the tallest ship obstruct navigation. Usually the degree of obstruction is reasonable in relation to the commercial benefits of the bridge. Sometimes, however, changes in the nature of water-borne commerce or the

conditions of the waterway render unreasonable an obstruction that was justified when built. Congress promised that, when such a change occurs, the United States will bear part of the renovation expense. But that is not all the Act does. Section 512 forbids maintenance of a bridge that has become an unreasonable obstruction, and § 519 imposes civil and criminal penalties on bridge owners that fail to comply with a renovation order. What is more – and what is more important – the Act supplies funding only if a bridge has become an unreasonable obstruction to navigation. I&M Rail Link treats the unreasonable-obstruction finding as a matter of form, a kind of administrative wink and nudge needed to liberate public funds. But we have no reason to think that Congress contemplated fraudulent findings; both the structure of the Act and the evident seriousness with which the Coast Guard takes its task show that public funds are available only if the bridge really is an unreasonable obstruction to navigation.

Perhaps the Truman-Hobbs Act as a whole was a concession to bridge owners, a victory for an interest group, but like most statutory packages it is a complex deal, with some features making life easier for the proponents and other features attaching prices. See Jerry L. Mashaw, Greed, Chaos, & Governance: Using Public Choice to Improve Public Law 81-105 (1997); Daniel A. Farber & Philip P. Frickey, Law and Public Choice: A Critical Introduction 88-115 (1991). Here a subsidy comes hand in hand with a finding that the bridge is an unreasonable obstruction to navigation. Such a finding has many consequences; one may be an effect on negligence litigation under the admiralty jurisdiction.

If the Coast Guard's finding were an unelaborated ukase, it would do Northstar little good in rebutting The Oregon's presumption. But the Coast Guard gave several reasons, and these reasons have independent significance for the suit. One is that, when the bridge was built, vessels moving on the river were smaller. A 154-foot channel was ample. Today, with wider, longer, and heavier vessels, the channel is too narrow. With a smaller vessel, the 154-foot span is adequate even if the pilot makes an error; today only precise navigation allows a transit without incident. The Coast Guard's report observes that towboats must maneuver near the bridge until wind and current, coupled with the vessel's momentum, permit a transit. That takes time, which increases the expense of navigation. Sometimes the towboat just can't do the job alone; power must be applied at both ends of the tow to keep the assembly straight. The Coast Guard added that "approximately 90% of the river pilots use helperboats at this bridge on some occasions." Helperboats, which are small tugboats, are costly and add to the delay in passing the bridge.

The Sabula Bridge is struck repeatedly. For the 11-year period 1980 through 1990, the bridge was hit at least 63 times. (Some allisions are not reported, so the Coast Guard views this as a conservative estimate.) There were 27,663 recorded commercial tows during this period, so at least 1 in every 439 transits produced an allision. I&M Rail Link says that this shows that the bridge is safe; with careful navigation a pilot can transit without incident. But the Coast Guard drew a different inference: it concluded that a bridge should have a much lower accident rate. What would one think of a highway bridge struck

by one out of every 500 passing cars? Or an airport designed so that one of every 500 landings produced an accident? What if one of every 439 trains passing over the Sabula Bridge derailed? An accident rate of 1 in 439 is too high for river transportation, the Coast Guard concluded. Doubtless some of these allisions could have been avoided by prudent navigation, but others must be chalked up to the fact that the bridge was designed for navigation in a different era.

Perhaps there would be less reason for concern if the Sabula Bridge were the only tight squeeze, and all other bridges had 300-foot spans to match the main navigation channel. But they don't. The degree of obstruction to navigation depends on the risks and costs of navigating the river from origin to destination. A series of bridges with a design similar to the Sabula Bridge may well pose costs substantially greater than the expense of renovation, and thus represent unreasonable obstructions to navigation in the sense that the value of precautions exceeds their discounted costs. *See United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir.1947); cf. *Reardon v. Peoria & Pekin Union Ry.*, 26 F.3d 52 (7th Cir.1994). The Sabula Bridge is the third-most-frequently struck on the Mississippi: it was hit at least 204 times from 1972 through 1996; the two "leaders" were hit 481 and 350 times during this period, and three other bridges were struck at least 100 times during these years. Other bridges are hit rarely if ever. It is unlikely that all of these allisions can be attributed solely to pilots' negligence. Calling the most-frequently-struck bridges unreasonable hazards to navigation makes a good deal of sense.

If the Coast Guard may find the Sabula Bridge an unreasonable obstruction based on the cost and accident data, then so may the trier of fact in admiralty, where Learned Hand's famous *Carroll Towing* formula for negligence originated. Findings in the Coast Guard's report are more than adequate to overcome The Oregon's presumption. *See Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037, 1050-51 (7th Cir.1995). Perhaps Jarvis should have reversed the MEGAN BEESECKER's engines rather than attempting to use the Illinois channel; perhaps he blundered earlier when using the current to line up for the transit; but perhaps this was one of the allisions that are to be expected given the clash between an 1880 design and the nature of modern traffic on the Mississippi. See Charles Parrow, Normal Accidents: Living with High-Risk Technologies (rev. ed. 1999). The trier of fact must give an answer without resort to presumptions. Although the Coast Guard's findings may well be conclusive for some purposes under *Monongahela Bridge Co. v. United States*, 216 U.S. 177, 30 S.Ct. 356, 54 L.Ed. 435 (1910), the question remains whether the shortcomings of the bridge caused this accident. Because admiralty uses a comparative-fault regime, the possibility that Jarvis and the bridge's design each bear some responsibility cannot be overlooked. The judgment is reversed, and the case is remanded for trial.

APPENDIX B

United States District Court,
Northern District of Illinois

98 C 50359

I & M Rail Link vs. Northstar

Name of Assigned Judge
Philip G. Reinhard

DATE 4/21/1999

ORDER

Plaintiff, I&M Rail Link, filed a complaint against Northstar Navigation, Inc., in personam, and the M/V Megan Beesecker, in rem, for damages incurred by plaintiff's Sabula bridge on May 5, 1997. The complaint was originally filed in the Eastern Division of the Northern District of Illinois, but was transferred to this division for proper venue by Judge Norgle. In the same order, Judge Norgle denied defendant's motion contesting personal jurisdiction. This court has jurisdiction over this admiralty claim pursuant to 28 U.S.C. § 1333, Fed. R. Civ. P. 9(h) and 46 U.S.C. § 470.

Briefly, the facts are that the Sabula bridge is a span bridge with two passages around the center span, the Iowa and the Illinois draw. Generally, downstream traffic used the Iowa draw. On May 5, 1997, the M/V Megan Beesecker, a tug, was on its way down stream with a load of 12 barges. A half mile from the bridge, the pilot became aware of the strong wind conditions and thereafter, he realized he was out of position to go through the Iowa draw. (Jarvis dep. p. 73). The pilot attempted to correct, but became more out of alignment and had to

attempt the Illinois draw. The front left barge contacted the bridge, and an accident occurred. Some of the barges and the M/V Megan were not removed from the draw until sometime the next day. Plaintiff, the owner of the bridge, brought this action against the owner of the boat and the boat, and is seeking a warrant of seizure for the boat pending this action. Plaintiff also seeks summary judgment as to its complaint. Defendants have filed a counter-complaint for the damage to the boat.

The Seventh Circuit applies the Oregon rule, which holds that there is a presumption of fault against a moving vessel when it strikes a stationary object, such as a bridge. *See Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037, 1051 (7th Cir. 1995). That presumption can be rebutted by presenting evidence that the allision was the fault of the stationary object, the moving ship acted with reasonable care, or that the allision was an unavoidable accident. *Id.* In this case, there is no evidence that the bridge operator was negligent. The facts indicate the bridge, specifically the Illinois draw, is in compliance with its existing permits in that it exceeds the 154 feet requirement of the permit issued in 1943. Instead, defendant's argument in that respect is that the bridge was an unreasonable obstruction of navigation, in violation of 33 U.S.C. § 512, therefore invoking the presumption created by Pennsylvania rule, that a violation of a statute intended to prevent collisions shifts the burden to the violating party of proving that the violation could not have been a cause of the collision. *See id.* at 1046-47.

The Pennsylvania Rule is not applicable to this situation. All bridges are an obstruction to navigation, but are necessary for commerce. The fact that an administrative

agency has declared the bridge an unreasonable obstruction to navigation for purposes of qualifying for federal funds does not mean the bridge is per se in violation of a navigation statute. The opinions of the pilot, president of defendant Northstar and a marine surveyor that the bridge is an unreasonable obstruction and the accident would not have occurred if the opening was 300 feet is not relevant to the question of the bridge's negligence. Plaintiff admits that the bridge is difficult to navigate and it would obviously be easier to navigate if the opening was twice as wide. The bridge has been in existence since 1880 and did not engage in any active behavior that could be said to be a negligent cause of the allision. Cf. *id.* at 1055 (drawbridge not opened to the maximum angle specified in permit was sole and proximate cause of allision between moving vessel and bridge). Defendants' argument that the protective structures were dilapidated is a damages issue.

Defendants have also failed to rebut the presumption of negligence with evidence that the ship acted with reasonable care. The pilot M/V Megan Beesecker was aware of the conditions of the bridge and had in fact successfully navigated in a number of times in the past. The captain of a ship is charged with knowing all navigational conditions reasonable ascertainable by experienced mariners navigation the waterway. *Illinois Constructors Corp. v. Logan Transp., Inc.*, 715 F. Supp. 872, 881 (N.D. Ill. 1989). The pilot testified he was familiar with the currents and was aware of the wind factor when he was still capable of stopping and reversing direction. (Jarvis dep. pp. 78, 80-81).

Finally, there is no evidence the weather conditions were such that the allision was unavoidable, i.e., a hurricane or other catastrophic condition.

Plaintiff prevails because it has met its burden of a prima facie case of negligence through the presumption created by the Oregon Rule and defendants have not met their burden of rebutting that presumption of negligence and are therefore liable for the allision. Plaintiff is granted summary judgment.

The motion for a warrant of seizure is denied without prejudice as defendants have represented there is adequate security.

APPENDIX C

I&M RAIL LINK, LLC,
Plaintiff-Appellee,

v.

NORTHSTAR NAVIGATION, INC.,
Defendant-Appellant.

No. 99-2128.

United States Court of Appeals,
Seventh Circuit.

Feb. 25, 2000.

Weston W. Marsh, Freeborn & Peters, Chicago, IL, for Plaintiff-Appellee.

James K. Mondl, Tonkin & Mondl, St. Louis, MO, for Defendant-Appellant.

Before EASTERBROOK, ROVNER, and DIANE P. WOOD, Circuit Judges.

On Petition for Rehearing

PER CURIAM.

I&M Rail Link has filed a petition for rehearing en banc, asserting that our decision conflicts with *Texas & P. Ry. v. Angola Transfer Co.*, 18 F.2d 18 (5th Cir.1927), and *Seaboard Airline R.R. v. Pan American Petroleum & Transport Co.*, 199 F.2d 761 (5th Cir.1952). According to I&M Rail Link, each of these cases stands for the proposition that the Coast Guard's finding under the Truman-Hobbs Bridge Act of 1940, 33 U.S.C. §§ 511-23 that a bridge poses an "unreasonable hazard to navigation" must be ignored in admiralty litigation, and in particular that such a finding does not affect the rule of *The Oregon*, 158 U.S. 186,

192-93, 15 S.Ct. 804, 39 L.Ed. 943 (1895), that the moving vessel is presumptively at fault in any allision.

Neither of these cases mentions the Truman-Hobbs Bridge Act or *The Oregon*, so it is difficult to see how they stand for the proposition I&M Rail Link attributes to them. *Angola Transfer*, decided 13 years before the statute's enactment, could not have any bearing on its interpretation. What the two cases have in common with ours is that in each an administrative official had issued an order to renovate the bridge. That is also the limit of the overlap. In *Angola Transfer* the court of appeals held after a full trial that the renovation was unrelated to the accident. No such finding has been (or could be) made in this case, which was decided on cross-motions for summary judgment.

Seaboard likewise was decided after a trial. The Secretary of War had ordered the bridge's span to be increased so that the Port of Savannah could accommodate larger ocean going vessels. This did not imply that the bridge posed safety hazards to the smaller vessels that had long been using the port. Moreover, the court of appeals did not conclude that a renovation order should be ignored; it held, instead, that such an order is not conclusive on the trier of fact, not only because it is issued ex parte but also because it does not establish that a particular shortcoming caused a given allision. We reached the same conclusion: the facts underlying the Coast Guard's decisions concerning the Sabula Bridge imply that shortcomings in its design may have played a causal role in the allision, but whether this is so (indeed, whether the design is deficient) is for the trier of fact.

All members of the panel have voted to deny the rehearing. No judge has called for a vote on the petition for rehearing en banc, which is denied.

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JUN 23 2000

(2)

No. 99-1904

IN THE
Supreme Court of the United States

I & M RAIL LINK,
Petitioner,

v.

NORTHSTAR NAVIGATION, INC.,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

MOTION FOR LEAVE TO FILE BRIEF *AMICUS CURIAE* AND BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION

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Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

MOTION OF THE ASSOCIATION OF AMERICAN RAILROADS FOR LEAVE TO FILE A BRIEF *AMICUS CURIAE*

The Association of American Railroads (AAR) respectfully moves for permission to file the attached brief *amicus curiae.* This motion is filed under Rule 37.2(b). Petitioner has consented to AAR's filing of a brief.[1] Respondent has refused consent.

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR seeks to file a brief *amicus curiae* only when the case presents an

[1] The letter expressing consent has been filed with the Clerk of the Court.

issue of great significance to the railroad industry as a whole-and in those instances such requests have been granted.[2]

In this case, the court below has misconstrued a federal statute, the Truman-Hobbs Act, in a way that will greatly increase the liability exposure of railroads that own bridges over navigable waterways. This is a matter of industry-wide concern because railroads own hundreds of bridges, a significant number of which are or may be subject to the Truman-Hobbs Act. Thus, this case does not represent an isolated event. To the contrary, railroads (and other bridge owners) can expect to be exposed on a recurring basis to the additional liability that will flow from the decision below. Railroads view this case with particular alarm because the statute in question was primarily enacted for the purpose of relieving railroads from a then-existing, unfair financial burden, not to expose them to a new burden.

When AAR appears before a court as *amicus curiae* it brings a broad, industry-wide perspective to the issue. AAR works closely with its member roads on a host of liability issues, many of which arise under statutes that have been enacted to apply uniquely to railroads (e.g., the Federal Employers' Liability Act, 45 U.S.C. §§51-60[3] and the Federal Railroad Safety Act, 49 U.S.C. §20101 *et seq.*) or, as in this case, with the specific concerns of the railroads in mind. Because, as with the statute at issue here, liability rules covering the railroad industry often flow from federal laws of nationwide applicability, judicial interpretations of these rules

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[2] *E.g., Consolidated Rail Corp. v. Wicker,* 119 S.Ct. 530 (1998); *CSX Transp., Inc. v. Sirbaugh,* 117 S. Ct. 1289 (1997); *Norfolk & Western Ry. v. Chittum,* 117 S. Ct. 597 (1996); *Metro-North Commuter R.R. v. Buckley,* 117 S.Ct. 379-80 (1996). All granting motion of AAR to participate as *amicus curiae.*

[3] Through subsequent legislation, FELA was also made applicable to the maritime industry. 46 U.S.C. §688.

can impact multiple railroads. As a result, AAR plays a prominent role in advocating on behalf of the industry in these matters.

As a trade association representing the nation's major railroads, AAR can assist this Court in understanding the impact of the lower court's ruling, by bringing the perspective of an entire industry, which often is different from that of the individual litigant, who may not be in a position fully to be aware of a case's impact on the industry as a whole. In this case, AAR has an interest not only in assisting the petitioner in obtaining relief from an erroneous decision, but also in assuring that an important federal law is not misconstrued to the detriment of railroads in the future.

For these reasons, leave to file the attached *amicus curiae* brief should be granted.

Respectfully submitted,

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IN THE

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NORTHSTAR NAVIGATION, INC.,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals For The Seventh Circuit

BRIEF OF THE ASSOCIATION OF AMERICAN RAILROADS AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE* [1]

Amicus curiae Association of American Railroads (AAR) is an incorporated, nonprofit trade association representing the nation's major freight railroads and Amtrak. AAR's members operate approximately 75 percent of the rail industry's line haul mileage, produce 93 percent of its freight

[1] No person or entity other than AAR has made monetary contributions toward this brief, and no counsel for any party authored this brief in whole or in part.

revenues, and employ 91 percent of rail employees. In matters of significant interest to its members, AAR frequently appears before Congress, administrative agencies and the courts on behalf of the railroad industry.

This case, which arises out of an allision between a marine vessel and a bridge spanning the upper Mississippi River, has potentially serious consequences for railroad companies by virtue of their ownership of numerous bridges over navigable waterways. As a result of the decision below, whenever such a bridge has become subject to an "Order to Alter" under the Truman-Hobbs Act, 33 U.S.C. §§511-523, a long-standing admiralty rule that favors bridge owners will be eliminated. The purpose of the Truman-Hobbs Act, a law that provides federal money to renovate bridges when necessary to aid navigation, is to relieve bridge owners from the financial obligation to alter their property for the benefit of water carriers. The Seventh Circuit has improperly transformed this law, which was enacted solely to shield bridge owners from an undue financial burden, into a sword that can be used against bridge owners whenever their bridges are struck by a marine vessel.

AAR members will be directly and adversely impacted by this decision because they own hundreds of bridges that traverse navigable waterways in the United States, a significant number of which are subject to the Truman-Hobbs Act. For example, the Norfolk Southern Railroad (NS) and the Burlington Northern Santa Fe Railway (BNSF), respectively, own 136 and 115 bridges that cross navigable waterways; 16 NS bridges and 6 BNSF bridges have been subject to the Truman-Hobbs Act. Union Pacific Railroad, another large AAR member, owns 62 bridges over navigable waters, of which 4 have been subject to the Truman-Hobbs Act, with 3 currently being studied for potential coverage under the Act. The Illinois Central Railroad and its affiliates own 12 bridges over navigable waters. Of thirteen bridges

that are currently subject to a Truman-Hobbs Order to Alter, nine are owned by railroads.[2]

The event that gave rise to this case was not an isolated occurrence. Bridges that have been subject to Truman-Hobbs orders have been struck hundreds of times by marine vessels during the past two and a half decades. *See* Petition at 11. There is no reason to doubt that these accidents will continue at a similar clip for the foreseeable future. If the decision below is allowed to stand, whenever such an event occurs (at least when occurring within the jurisdiction of the Seventh Circuit), it will not only be more difficult for the bridge owner to recover for the damage done to its own property by the vessel, it also will expose the bridge owner to liability for the cost of damage to the vessel, hardly the result envisioned by the 76th Congress when it enacted the Truman-Hobbs Act.

STATEMENT OF THE CASE

AAR adopts the Statement of the Case of petitioner.

SUMMARY OF THE ARGUMENT

The Seventh Circuit's decision in this case misconstrues the Truman-Hobbs Act, which was enacted by Congress to provide federal funding for the alteration of bridges over navigable waters for the purpose of aiding navigation. The court held that qualification of a bridge for Truman-Hobbs funds has the effect of eliminating the century-old presumption in admiralty that when a moving vessel hits a stationary object (like a bridge), the moving vessel is at fault. This ruling is at odds with the purpose and intent of the

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[2] *See* Letter from N.E. Mpras, Chief, Office of Bridge Administration, U.S. Coast Guard to Michael J. Scotti (May 2, 2000)(providing information requested by petitioner from the Coast Guard pursuant to the Freedom of Information Act (FOIA Information). *See* Petition at 17.

Truman-Hobbs Act, which was to relieve bridge owners, who are predominantly railroads, from the unfair burden of having to pay for alterations to their property which aid navigation rather than the bridge owner. Not only does the legislative history fail to lend any support to the court's determination that the Act was intended to alter a long-standing rule of liability to the detriment of bridge owners, it makes abundantly clear that Congress specifically was concerned, as a matter of fairness, with rectifying an injustice in the existing law which required bridge owners to pay for such alterations. It is equally clear that Congress did not perceive the Truman-Hobbs Act as conferring a benefit on bridge owners (which might be offset by a burden), as the Act requires the bridge owner to be responsible for all costs associated with the alteration which might benefit the owner.

The court's erroneous reading of the Truman-Hobbs Act is particularly troubling to the railroad industry because it has the effect of forcing railroads to subsidize water carriers, a competing mode of transportation. Railroad bridges are frequently hit by marine vessels: in fact, a substantial number of these allisions involve bridges that have qualified for Truman-Hobbs funds. In these cases, the bridge owner will now likely be financially responsible for both the damage caused to its own property by the vessel, as well as any damage to the vessel. The unwarranted reversal of a rule of liability by the court below will lead to payments from railroads to water carriers as a direct result of the Truman-Hobbs Act. This decision, which crafts a subsidy of one mode of transportation by a competing mode, which was never contemplated nor intended by Congress, should be reviewed by this Court.

ARGUMENT

I. THE DECISION BELOW IMPROPERLY FORCES BRIDGE OWNERS TO SUBSIDIZE USERS OF NAVIGABLE WATERWAYS, A RESULT DIRECTLY CONTRARY TO THE PURPOSE OF THE TRUMAN-HOBBS ACT

In 1940, Congress sought to relieve railroads and other owners of bridges over navigable water from a "harsh rule" which forced them to pay for alterations to their property which provided them with little or no benefit. Sixty years later, the Seventh Circuit, without direction from Congress, has devised its own harsh rule of liability that will strongly encourage bridge owners to bear precisely the costs the Truman-Hobbs Act was intended to prevent.

The Seventh Circuit speculates that since the Truman-Hobbs Act grants benefits to bridge owners, it must also impose burdens. *I&M Rail Link, LLC v. Northstar Navigation, Inc.*, 198 F.3d 1012, 1015 (7th Cir. 2000)("[t]he Truman-Hobbs Act . . . is a complex deal, with some features making life easier for the proponents and other features attaching prices."). This burden, the court of appeals presumes, is the eradication of the presumption, established by this Court in *The Oregon*, 158 U.S. 186 (1895), which states that when a moving vessel collides with a stationary object there is a presumption that the stationary object was not at fault and that the moving vessel caused the accident. (As petitioner explains, it is a pragmatic, logical and equitable rule. *See* Petition at 13-14.) Yet the statutory language and legislative history are devoid of any support for this notion. Both the statute and the legislative history make clear that Congress did not perceive the Truman-Hobbs Act as conferring a benefit on bridge owners, as the bridge improvements to be covered by federal money were not for the benefit of the bridge owner. Thus, any "offsetting" burden the Seventh Circuit reads into the law is wholly

gratuitous. Morever, notwithstanding its views on the equities, a lower court is not free to offset a putative benefit (for example, by deeming a common law rule of liability abrogated) in the absence of a strong indication that it was Congress' intent to do so. *See* Petition at 25.[3]

A. In Enacting the Truman-Hobbs Act, Congress Meant to Relieve Bridge Owners of the Obligation to Finance Bridge Alterations That Were Designed for the Benefit of Navigation

Notwithstanding the Seventh Circuit's insistence that it was merely recognizing an implicit bargain that resulted in the 1940 legislation, its decision, in fact, upends the legislative purpose of the Truman-Hobbs Act. As a consequence of the decision below, the owner of a bridge that has qualified for Truman-Hobbs funding would be considered to have created an "unreasonable obstruction to navigation," which, in turn, can lead to legal liability whenever such a bridge is struck by a moving vessel. This flies in the face of the essential purpose of the Truman-Hobbs Act, which is that the cost of alteration of bridges, to the extent it is for the purpose of aiding navigation, is to be borne by the public rather than by the bridge owner.

Examination of the legislative history of the Truman-Hobbs Act reveals that the underlying purpose of the legislation was to relieve bridge owners, frequently railroads, from the unfairness of the then-existing law. At the time, if the government ordered alterations be made to a bridge in order to aid navigation, the owner was required to bear the full cost. As one supporter of the bill explained, "[t]he purpose of this bill was to relieve bridge owners of this harsh rule which requires owners to alter bridges at their own

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[3] *United States v. Texas*, 507 U.S. 529, 534 (1993); *Norfolk Redev. & Hous. Auth. v. Chesapeake & Potomac Tel. Co.*, 464 U.S. 30, 35 (1983)

expense, whether or not they receive any benefit from the alteration . . ." 86 Cong. Rec. 8647 (1940)(statement of Representative Lea).

Virtually every member of Congress who spoke in favor of the bill echoed this sentiment. Representative Culkin opined that "I think [the railroads'] rights are definitely and unfairly invaded under the present law and this legislation offers a positive cure in the situation." 86 Cong. Rec. 8650 (1940). Representative Miller added that the bill "corrects a mistake that was made years ago . . ." *Id.* Representative Dirksen noted that "it would be unfair to assess a railroad, for instance, if they received no benefit." *Id.* Finally, Representative Crosser explained that the mere fact that existing law apportioned burdens on bridge owners far exceeding the benefits conferred did not justify opposition to the bill: "If existing law is wrong, that is why it should be replaced." *Id.*[4]

Members of Congress went to great lengths to dispel any notion that the bill would grant a benefit or subsidy to bridge owners. The bill made the bridge owner responsible for all costs and expenses that arguably would result in a benefit to the bridge owner, a feature that remains part of the law. *See* 33 U.S.C. §516; *see also* statement of Representative Hobbs.

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[4] President Roosevelt had vetoed the legislation, and numerous members of his party made the difficult decision to override the veto in order to pass important legislation, grounded in both the national interest and equity. As Representative Hobbs pleaded with his colleagues:

> With the sincerest admiration for our great President, with genuine regret that agreement with him on this point is impossible, I beg you to serve national defense, relieve unemployment, *be fair to the railways*, and , therefore, pass this perfectly meritorious bill over his veto.

86 Cong. Rec. 8653 (1940)(emphasis supplied).

86 Cong. Rec. 8653 (1940).[5] It was well understood that funds that were to be released under the Truman-Hobbs Act were solely for the purpose of aiding navigation. Representative Hobbs explained: "Bear in mind: the basis of the order for the improvement is the needs of navigation. Therefore, since a perfectly good railroad bridge, adequately serving railway needs, is to be remodeled solely because of the needs of the competing carrier, it is manifest that navigation should be taxed with an equitable share of the cost." 86 Cong. Rec. 8654 (1940). Thus, the Seventh Circuit's premise that bridge owners must be willing to accept the price that comes with a government subsidy is off base because the Truman-Hobbs Act simply never has and still does not provide a subsidy of any kind to bridge owners.

B. The Decision Below Improperly Shifts Responsibility for Allisions from Moving Vessels to Stationary Objects, Unjustly Forcing Railroads to Subsidize Their Competitors

Though Congress was clear that the Truman-Hobbs Act was adopted to promote fairness, not a subsidy, to bridge owners, the Seventh Circuit has crafted its own subsidy: in this case from one mode of transportation to a competing mode. While trucking companies are the primary competitors of railroads, where navigable waterways exist--primarily along the Mississippi River and the rivers that feed into the Mississippi–barge lines also compete vigorously with railroads, particularly for bulk commodities like coal and grain, which constitute an important part of the railroads'

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[5] "[T]his bill requires that there should be charged up against the railroad all benefits that flow to the railroad company from the improvement . . ." Representative Hobbs added that "the bill is sound, fair and altogether equitable. It charges every proper element of cost against the railways which should be borne by them." 86 Cong. Rec. 8654 (1940).

business.[6] Eliminating the presumption established by *The Oregon* grants an unwarranted advantage to water carriers at the expense of railroads, shifting a balance that already is tipped in favor of railroad competitors by virtue of the existing federal subsidy structure.

The rail industry is unique among transportation modes in that its rights-of-way are not constructed and/or maintained with public funds. Railroads own the tracks and roadbeds on which their trains travel, for which they are financially responsible (and on which they pay property taxes). In 1998 alone, Class I railroads invested nearly $5 billion in their roadways and structures.[7] In contrast, primarily through the U.S. Army Corps of Engineers, the nation's inland waterway system, which provides the infrastructure of the barge lines and other inland water carriers, is built, operated, maintained and improved with public money.[8] Around $800 million is spent annually by the federal government on these functions, with only about 10 percent being covered by taxes paid by the commercial users of the waterways.[9]

While the equity of government aid to the various components of our nation's transportation industry is a matter

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[6] In 1998, coal traffic accounted for about 23 percent of rail revenue; grain traffic accounted for 6.5 percent. Association of American Railroads, *Railroad Ten-Year Trends, 1989-1998* at 51, 54 (1999).

[7] Association of American Railroads, *Railroad Facts* 43 (1999 ed.).

[8] The federal government also builds and maintains a system of highways that are used by the trucking industry; airports and the air traffic system are largely funded with public money.

[9] *See* Congressional Budget Office, Paying for Highways, Airways and Waterways: How Can Users be Charged? 53 (1992). While these specific figures are from the early 1990s, the relationship between federal spending and user contributions has remained about the same. *See e.g.*, U.S. Army Corps of Engineers, *The 1997 Inland Waterway Review* (1997); Budget of the United States, FY 1997.

to be taken up by Congress rather than the courts, this Court should not sit idly by when a lower court has erroneously exacerbated the existing inequity. Railroad bridges that traverse navigable waters, though constituting a small portion of the rights-of-way which the railroads own and maintain, frequently are damaged in allisions with water carriers. Moreover, a high proportion of the bridges hit have been subject to Truman-Hobbs orders. *See* Petition at 11. While in some cases the damage is minor, the total cost to repair this vital railroad property runs into the millions of dollars. Since it is rare indeed for a bridge to move into the path of an oncoming vessel, the rule of *The Oregon* has at least facilitated the ability of bridge owners to recover their losses.

The ruling below vastly changes the equation. Now, railroads risk not only losing their ability to be compensated for the damage done to their property, but also of being found liable for any damage caused to a moving vessel when that vessel fails to avoid hitting the bridge, even though its position had been fixed, and well known, for many years.[10] Shifting the cost of these accidents from vessel owner to bridge owner results in a subsidy by railroads paid to their direct competitor, the water carriers. Moreover, in many cases, the potential for this subsidy will continue for a long period of time, as many years may go by between the time an "Order to Alter" is issued and all the government funding required to complete the work has been made available by Congress and released.[11] Were this result mandated by the

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[10] While the bridge owner brought the action in this case, the barge line filed a counterclaim seeking recovery for the damage to its vessels.

[11] *See* FOIA Information. In six of the thirteen pending Truman-Hobbs projects, the order was issued prior to 1995. In most of these cases, the vast majority of the funding is to come from the federal government, giving the bridge owner little control over the timing of the project. For example in the case of one bridge, the order was issued on April 1, 1991, yet as of last month only $1.2 million of $39 million has been made

statute, it might properly be considered a cost of doing business. However, in enacting Truman-Hobbs, it is clear that Congress did not intend to give with one hand and take away with the other.

This Court has looked askance at governmental efforts to require railroads to subsidize competing transportation modes. *See Nashville, C. & St. L. Ry. v. Walters,* 294 U.S. 405 (1935). In that case, the state of Tennessee had ordered a railroad to construct and pay half the cost of an underpass to separate grades where a proposed federal aid highway was to cross the railroad's main line. This Court did not take issue with the general concept that under the state's police powers it could require railroads to fund grade crossing separations. However, this Court remanded the case to the Tennessee Supreme Court, because that court had refused to consider special circumstances which raised serious constitutional questions about the state's action.

Of specific significance was the fact that the financial obligation that was being exacted from the railroad was for improvements which appeared not to benefit the railroad, but instead to favor its direct competitors. This Court noted, that unlike in the past where railroads benefitted from grade crossing separations, "[t]he effect upon the railroad of constructing federal aid highways . . . is entirely different." *Id.* at 423. This Court went on to explain the impact on the railroad:

> [federal aid highways] deplete the existing rail traffic and the revenues of the railroads. Separation of grades serves to intensify the motor competition and to further deplete rail traffic. The avoidance thereby made possible of traffic interruptions incident to crossing at

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available by the government, with the project not expected to be completed until 2003.

> grade are now of far greater importance to the highway user than it is to the railroad crossed.

Id. at 423-24. In short, this Court found troubling a scheme which required a railroad to subsidize the separation of its lines from the highways when "[p]ractically all vehicles moving upon [those highways] will directly or indirectly compete for traffic with the railway." *Id.* at 426.

Just as this Court was skeptical about an administrative decision that forced a railroad to pay for infrastructure improvements that benefitted its direct competitor, it should be equally skeptical of a judicial decision that construes the Truman-Hobbs Act as a mechanism for shifting liability from water carriers to railroads.[12] Water carriers will no doubt seize on the ruling below to avoid the rule of *The Oregon* and contest efforts by bridge owners to recover for damage to their bridges. In place of the existing system of resolving disputes by negotiation, the Seventh Circuit's decision will lead to increased litigation over the issue of how to allocate liability. Most assuredly, the court's misuse of the Truman-Hobbs Act will make more likely a transfer of wealth from railroads to a competing mode of transportation.[13] This Court should review the decision which is responsible for this result, never intended nor envisioned by Congress.

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[12] Representative Hobbs opined that bridge owners had an even stronger case for relief than did the railroad in *Walters*. 86 Cong. Rec. 8654-55 (1940).

[13] The Seventh Circuit asserts that under its holding it will simply be left to the jury to determine which party was responsible for causing an allision. However, the court's suggestion that once a Truman-Hobbs "Order to Alter" has been issued the bridge owner is in violation of 33 U.S.C. §512, may bring into play the rule of *The Pennsylvania*, 86 U.S. 125 (1873). This presumption against owners of bridges that are in violation of a statute will greatly increase the likelihood that the bridge owner will be required to bear at least some of the cost of any allisions.

CONCLUSION

For the foregoing reasons, *amicus curiae* respectfully submits that the petition for a writ of *certiorari* to review the judgment of the Court of Appeals for the Seventh Circuit be granted.

Respectfully submitted,

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No. 99-1904

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On Petition For Writ Of Certiorari
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RESPONSE TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

The Sabula Railroad Bridge is owned by Petitioner and is one of the most frequently struck bridges in the Midwestern United States. The Coast Guard declared the bridge an unreasonable obstruction to navigation in 1995. On May 5, 1996, Respondent's vessel struck the bridge when attempting to navigate its narrow spans. In the ensuing litigation, the district court concluded that Respondent's vessel should be presumed at fault and that it had not rebutted that presumption at the summary judgment stage. The court therefore granted summary judgment against Respondent. The Seventh Circuit Court of Appeals reversed the district court grant of summary judgment and remanded the case for trial on the merits.

The issue presented is:

Whether Respondent is entitled to present its evidence at trial regarding the parties' respective liability for this accident.

DISCLOSURE STATEMENT

Northstar Navigation, Inc. has no parent corporation, and no shareholders that are publicly held companies.

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STATUTES INVOLVED

33 U.S.C. § 512. Obstruction to Navigation

No bridge shall at any time unreasonably obstruct the free navigation of any navigable waters of the United States.

STATEMENT OF THE CASE

This case reaches the Court at the summary judgment stage. Trial is scheduled for later this year. Records submitted in support of and opposition to the summary judgment motion suggest the following:

Petitioner I&M Rail Link ("Petitioner") owns the 100 year-old Sabula Railroad Bridge ("the Bridge"), which spans the Mississippi River (Appx. 1). Rather than having one wide channel opening or "span" in the center of the river, the bridge has two narrow spans along the western bank (Appx. 3). Downbound vessels, while being pushed by river currents as they approach the Bridge, must navigate toward the right descending bank and hug the Iowa shore (Appx. 47). The river current near the Iowa bank is erratic, first pushing the vessel towards the bank and, immediately above the Bridge, deflecting the vessel away from the bank (Appx. 92-93, ¶ 3; 102-03, ¶ 4). This precarious approach, necessitated by the configuration of the Bridge, makes it one of the most frequently struck bridges in the entire Midwestern United States (Appx. 50).

After receiving many complaints from vessel owners and operators over the years, and following numerous

accidents at the Bridge, the United States Coast Guard initiated an investigation in 1994 into the obstructive character of the Bridge (Appx. 58-59). The Coast Guard investigated the hazards and damages caused there over the years, accepted public comment, and held a public hearing (Appx. 58). On September 27, 1995, the Coast Guard issued a detailed report of its findings, with the conclusion that the Bridge posed an "unreasonable obstruction to navigation" and should be modified by its owner (Appx. 58, 73). The Coast Guard reached this conclusion after finding 63 significant accidents at the Bridge between 1980 and 1990, causing millions of dollars in damage (Appx. 58). The Coast Guard report on the Bridge states:

> The restricted channel width, position of the bridge, shallow water depths near the bridge, and severe cross currents all combine to pose serious problems in getting aligned for the bridge approach, even for the most experienced pilots. Safe transit of the restrictive navigation span requires extensive tow maneuvering. . . .
>
> During periods of high water the narrow horizontal opening makes it virtually impossible for tows to transit the bridge without contacting the bridge piers or protection cells. The use of helper boats becomes necessary, a practice that by itself is considered unsafe by many pilots since it requires the helper boat to transit the bridge backwards while attached to the head of the tow. . . .
>
> . . .
>
> The horizontal opening of 154 feet does not provide adequate clearance for contemporary

> commercial tows. This leaves about 24 feet of clearance on each side of the tow when transiting the bridge. This requires commercial tows to be perfectly aligned with the opening when approaching and transiting the bridge to avoid contacting the bridge. This is not what the navigational characteristics of the waterway dictate.

(Appx. 59-60).

Because of the dangers posed by the Bridge, the Commandant of the Coast Guard on June 17, 1996, ordered the Bridge owner to provide a channel opening at least 300 feet wide (Appx. 77), creating greater clearance for downbound vessels, allowing downbound vessels to push ahead on their engines and steer the Bridge (rather than backing on their engines and "flanking" the Bridge), thereby avoiding the hazards associated with wind and current at that location (Appx. 96-97, ¶ 16; 103-04, ¶ 8).

Petitioner has not taken any steps to comply with the Coast Guard's order. Other bridge owners on the Mississippi River have widened to 300 feet the narrow passages similar to those that currently exist at Petitioner's bridge, and accidents at those bridges have been virtually nonexistent since those alterations (Appx. 96-97, ¶ 16; 103-04, ¶ 8). The accident at issue in this case would not have occurred if Petitioner had widened the channel at the Bridge to 300 feet as the Coast Guard previously mandated (Appx. 96-97, ¶ 16; 103-04, ¶ 8).

On May 5, 1997, Respondent's vessel, the M/V Megan Beesecker, slowly approached the Bridge shoving 12 loaded barges while downbound on the Mississippi River. When the boat passed below an island just upriver

from the Bridge, pilot James Jarvis first noticed wind from the north/northwest. When the boat was approximately ½ mile above the Bridge, those winds gusted, causing the boat and stern of the tow to drift slightly toward the center of the river. Pilot Jarvis does not know if the vessel would have stopped at that point had he attempted to put the engines in full reverse. He is certain, however, that if he had attempted to stop, he would have lost control over his ship, and a collision would have been unavoidable had that stopping attempt failed. To maintain control over his vessel during that situation, he attempted to correct the alignment by maneuvering the boat to compensate for the drift. He believed at the time, and continues to believe to this day, that seeking to correct the alignment of the boat rather than attempting to stop and abandoning control was a reasonable decision. Along with Mr. Jarvis, every other witness believes that these decisions were reasonable, and Mr. Jarvis' efforts to control the situation demonstrated prudent seamanship (Appx. 94-95).

The M/V Megan Beesecker entered the Illinois span of the Bridge slightly angled (Appx. 48). Because the wind and current pushed the boat and tow out of perfect alignment with the Bridge span, one of the barges contacted the protective structures surrounding the Bridge. The structures extend upstream and downstream of the Bridge piers, and are designed to protect the Bridge and vessels passing through the span at the Bridge (Appx. 86). However, Petitioner had allowed the protective structures to deteriorate to the point where they were virtually worthless (Appx. 104, ¶ 9). When a barge in tow of the

M/V Megan Beesecker contacted those structures, the Bridge, barges and the vessel sustained damage.

Petitioner filed suit against Respondent for bridge damage and Respondent counterclaimed against Petitioner for damage to the boat and barges. Petitioner moved for summary judgment, asserting that Respondent was entirely at fault for the accident. The district court granted that motion, invoking the presumption commonly called *The Oregon* Rule, which creates a presumption of fault against a vessel striking a fixed object. The appellate court reversed, holding that Respondent was entitled to present evidence of liability at trial.

The opinion by the three-judge panel of the Seventh Circuit Court of Appeals remanding the case for trial was unanimous. When Petitioner submitted its petition for rehearing to the three-judge panel, each of those judges voted to deny the petition. When the Seventh Circuit circulated Petitioner's petition for rehearing en banc, not one judge called for a vote on that petition.

REASONS FOR DENYING THE WRIT

This is an interlocutory appeal. No party has yet been deemed liable to the other party. The appellate court ruled that the district court erroneously granted summary judgment, and remanded the case for trial. The central issue before this Court is whether Respondent should be entitled to present evidence of the parties' liability at trial. This Court ought not expend its

resources or that of the parties on an order from the appellate court which has yet to resolve the liability of any party.

Additionally, this Court may never reach the question presented by the Petitioner, because the district court order was erroneous for reasons beyond that raised in Petitioner's brief. Even if Respondent should have been presumed at fault as Petitioner contends, Respondent submitted ample evidence to rebut that presumption, which entitled Respondent to present evidence at trial regarding the parties' respective liability. Specifically, Respondent presented evidence that Mr. Jarvis acted prudently in all stages of his approach to the Bridge, while no witness or other evidence suggested that Mr. Jarvis acted imprudently. Additionally, the record shows that the Bridge failed to conform to its permit, and that Petitioner allowed its bridge to fall into disrepair. Each of these facts prevented Petitioner from relying on a presumption of fault against Respondent, or from obtaining summary judgment on Petitioner's own liability. Accordingly, the district court order granting summary judgment should not be sustained, regardless of this Court's ruling on Petitioner's question presented.

Petitioner addresses none of these issues in its brief, but proffers other arguments for consuming this Court's time and the parties' expense in this appeal. The submitted arguments are without merit and the Petition for Writ of Certiorari should be denied.

1. The Panel Decision promotes safety and is consistent with prior decisions.

Petitioner erroneously contends that the "Seventh Circuit's decision causes a profound reversal of the rules of admiralty law with harmful consequences." (Pet. at 10). To the contrary, the Seventh Circuit opinion will promote safety, and the opinion is consistent with and mandated by admiralty law.

As an initial matter, Petitioner's credibility in promoting safety on navigable waters is dubious. Petitioner's bridge has caused millions of dollars in damage to vessels over the years. In spite of the Coast Guard's order compelling Petitioner to fix its bridge so as to eliminate scores of accidents every year, Petitioner has done nothing. What Petitioner seeks is not navigational safety, but avoidance of a judicial incentive to modify its bridge to render the river near Sabula safer. The appellate court decision promotes maritime safety by compelling Petitioner to rectify the extreme dangers posed by its bridge. Petitioner's asserted concern with navigational interests is simply specious.

Petitioner contends that, because the appellate court held *The Oregon* Rule inapplicable in this case, river pilots will no longer exercise reasonable care when traversing its bridge. This argument, too, is pure sophistry. The appellate court opinion fashions no change in the imposition of liability against negligent vessel operators: "Because admiralty uses a comparative-fault regime, the possibility that Jarvis [the vessel pilot] and the bridge's

design each bear some responsibility cannot be overlooked." *I&M Rail Link v. Northstar Nav., Inc.*, 198 F.3d 1012, 1016 (7th Cir. 1999). If a vessel strikes the bridge because of the vessel's unsafe practices, that fault will result in liability proportionate to the vessel's share of responsibility for the accident. That potential liability, in addition to the obvious desire of any vessel to avoid placing the crew at peril, is certainly adequate to encourage safe navigation.

More significantly, the appellate court opinion recognizes that bridge owners must eradicate their own unsafe practices. The Bridge has for decades been the site of countless accidents, yet its owners have sat idly by, wholly expecting the risk of injury and the cost of repairs to fall entirely upon vessel operators. This expectation by Petitioner contravenes numerous decisions. For example, *Central Rivers Towing, Inc., v. City of Beardstown*, 750 F.2d 565, 569 (7th Cir. 1984), dismissed the argument raised by Petitioner here that the issuance of a permit to build a bridge forever immunizes a bridge owner from any form of liability: "Permission to erect such a bridge . . . does not give an indefinite right to maintain it under changed conditions. . . . Granting that the bridge involved here was a reasonable obstruction when it was built, . . . it [later] became an unreasonable obstruction, for whose existence the railroad was responsible."). In *Folkstone Maritime, Ltd., v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995), the court disregarded *The Oregon* presumption where a bridge "impeded navigation more than [was] absolutely necessary." As the court there stated, "Admiralty law thus makes clear that a bridge may not unreasonably obstruct free navigation. Indeed, federal statutory law

stipulates that bridges may not 'unreasonably obstruct the free navigation of any navigable waters.' " *Id.* at 1048. In *Rodi Yachts, Inc. v. National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993), the court rejected blind application of *The Oregon* Rule advocated by Petitioners:

> Because American law is too complex and should where possible be simplified, we are sympathetic to the suggestion that " 'negligence' at sea does not differ, in principle, from 'negligence' ashore," *Grant, Gilmore & Charles L. Black, Jr.*, THE LAW OF ADMIRALTY § 7-11 at p. 509 (1975), implying that special presumptions applicable only to proof of negligence in admiralty cases should be shunned.

Id. at 886.

Nothing prohibits bridge owners from remedying unsafe conditions at their bridges without awaiting an order from the Coast Guard. Indeed, lower court opinions mandate such action, which is much more consistent with encouraging safe navigation than the position proffered by Petitioner. The appellate court decision simply applies both common sense and precedent to avoid the absurd result that Petitioner seeks – to force vessel operators to pay for damage caused by its bridge.

Petitioner forecasts that, because of the appellate court decision, thousands of " 'new' federal lawsuits will be filed on behalf of marine lines against bridge owners. . . . " (Pet. at 14-15). Petitioner cites not one case that has been filed in the six months since the Seventh Circuit issued its decision in this case. If the appellate court created new law at all, its effect has been more of a drip than the flood forecast by Petitioner.

Petitioner claims that "wholesale injustice" will result without blind application of *The Oregon* Rule (Pet. at 15). Petitioner's advocacy misconstrues the purpose of that rule. Presuming that a moving vessel is at fault when it strikes a stationary object is premised in "the common-sense observation that moving vessels do not usually collide with stationary objects unless the vessel is mishandled in some way." *Folkstone*, 64 F.3d at 1050. *The Oregon* Rule has never been rigidly applied to allisions *See, e.g., Folkstone*, 64 F.3d at 1050-51 ("as a matter of pragmatic necessity, *The Oregon* Rule is not susceptible to rigid application in the case of a drawbridge."), and "must be applied in a 'common sense' manner that is rooted in 'logic and experience.' " *Id.* at 1050. Vessels that strike unreasonable obstructions to navigation are not necessarily mishandled. Indeed, *The Oregon* Rule has always been subject to exceptions, including when, as here, the stationary object is guilty of fault. *See, e.g., Folkstone*, 64 F.3d at 1050; *Alamo Barge Lines, Inc. v. Rim Maritime Co.*, 596 F. Supp. 1026, 1033 (E.D. La. 1984) (vessel anchored in violation of law cannot rely on presumption of negligence when struck by moving vessel). *The Oregon* Rule in no way mandates the blind imposition of liability against a vessel that, as the evidence shows here, is not at fault. To the contrary, overwhelming authority rejects such an approach. *See, e.g., Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995); *Central Rivers Towing, Inc. v. City of Beardstown*, 750 F.2d 565 (7th Cir. 1984). Petitioner cannot be allowed, as a matter of law, to seek refuge in a 100 year-old permit that fact witnesses, expert witnesses, and the U.S. Coast Guard found dangerously outdated. The panel's decision

does not alter 100 years of admiralty law, but instead follows it.

II. The appellate court decision harmonizes regulation of safety on waterways.

Petitioner next contends that the Seventh Circuit's reconciliation of two statutory provisions of the U.S. Code will alter the interplay of various entities impacted by those statutes. This assertion is neither accurate nor significant.

Petitioner first contends that the panel decision will change the non-adversarial Truman-Hobbs proceeding into an adversarial one between bridge owners and the Coast Guard. However, the Truman-Hobbs Act already provides for such an adversarial proceeding:

> Whenever any bridge shall, in the opinion of the Secretary, at any time unreasonably obstruct such navigation, it shall be the duty of the Secretary, after notice to interested parties, to *hold a hearing at which the bridge owner*, those interested in water navigation thereunder or therethrough, those interested in either railroad or highway traffic thereover, and other party or parties in interest *shall have full opportunity to offer evidence and be heard* as to whether any alteration of such bridge is needed, and if so what alterations are needed, having due regard for the necessity of free and unobstructed water navigation and to the necessities of the rail or highway traffic.

33 U.S.C. § 513 (emphasis added).

In addition to the right to submit evidence, the bridge owner is entitled to appeal the Coast Guard's determination that a bridge is an unreasonable obstruction to navigation. 33 C.F.R. § 116.30(f). The owners of the Bridge in this case attended the hearing pertaining to its bridge, presumably received a full and fair hearing on the matter, and apparently decided not to appeal the Coast Guard's findings and order. It cannot now complain that the procedure was somehow unfair, was other than expected, or should be modified by this Court so the adversarial procedure contemplated by the Act becomes less adversarial.

Petitioner also contends that the ruling below is overturning decades of established maritime law, and cites *Folkstone Maritime, Ltd. v. CSX Corp.*, 64 F.3d 1037 (7th Cir. 1995), as the example of the precedent being overturned (Pet. at 18). According to Petitioner, the Seventh Circuit held in *Folkstone* that structures conforming to their permits cannot be characterized as negligent under admiralty law (Pet. at 18). *Folkstone* made no such ruling. *Folkstone* held that a bridge which did not conform to its permit was solely liable for an accident at that bridge. The court went on to note that "Liability for allisions may be imposed even in the absence of a statutory violation, if negligence was involved." *Folkstone*, 64 F.3d at 1046. Here, the Coast Guard ordered the Bridge owner to alter the Bridge, the permits themselves required modifications at the bridge owner's sole expense if the Bridge became an unreasonable obstruction to navigation (Appx. at 8, 73), the Bridge had been the site of numerous accidents for many years with no concern on the part of its owners for those hazards, and the Bridge deviated from

its permit in at least two respects (Appx. at 1, 58, 60, 79, 104). Nothing in the Seventh Circuit's opinion in *Folkstone* is inconsistent with the Seventh Circuit opinion in this case. Certainly the Seventh Circuit itself felt the two cases were consistent, as evidenced by the fact that no judge of that court voted to hear Petitioner's request for rehearing en banc. Petitioner's primary reliance on *Folkstone* underscores the weakness of Petitioner's argument that the opinion in this case has overturned decades of maritime law.

III. The appellate court decision upholds the clear legislative mandates.

Petitioner contends that making it pay for damages caused by its bridge is contrary to the intent of Congress, and is "economically irrational" (Pet. at 27). However, nowhere does the language of the statute or the legislative history suggest that a bridge owner is entitled to watch vessels strike its bridge every other week and do nothing to prevent those accidents. Petitioner cites no statute supporting its argument that a bridge owner can face no liability for every accident at its bridge. Instead, the relevant statute suggests quite the opposite: "No bridge shall *at any time* unreasonably obstruct the free navigation of any navigable waters of the United States." 33 U.S.C. § 512 (emphasis added). Petitioner seeks to rewrite the statute to allow unreasonable obstructions until the time when each bridge owner obtains federal funding to pay for modifications to its bridge, and that during the interim, vessel owners shall pay for all damage caused by the unreasonably obstructive character of

the bridge. Nothing in the language of the statute or the legislative history remotely suggests such a construction.

Petitioner contends that the ruling below improperly interpreted the Truman-Hobbs Act to repeal the common law. Specifically, Petitioner asserts that "Since the Truman-Hobbs Act made no reference to civil liability of bridges due to allisions, the common law of admiralty cannot be replaced by the Seventh Circuit's interpretation of the Truman-Hobbs Act." (Pet. at 25) However, the common law that Petitioner claims was repealed exists only in Petitioner's brief. The rule of *The Oregon* is the only rule cited by Petitioner, and that rule only creates an evidentiary presumption; *The Oregon* Rule does not create a cause of action, impose any liability, or defeat liability when a bridge is otherwise at fault. Moreover, the Seventh Circuit did not repeal *The Oregon*, but only applied that rule to this case in a manner consistent with prior decisions. *See, e.g., Wilmington Ry. Bridge Co. v. Franco-Ottoman Shipping Co.*, 259 F. 166, 169-70 (4th Cir. 1919) (Permitted bridge built with narrow passage for vessels cannot rely on *The Oregon* presumption: "[A]lthough the bridge was a lawful obstruction to navigation, the owners of the bridge, in making the charge of negligence, are burdened with the fact that they had chosen in its construction to leave little, if any, of that margin of safety which experience shows to be requisite to the avoidance of disaster, even when due care is exercised.") *Lauritzen v. Chesapeake Bay Bridge and Tunnel Dist.*, 259 F. Supp. 633, 638 (E.D. Va. 1966) (Violation by bridge of law pertaining to obstruction of navigable waters "gives rise to a presumption of negligence, which, if not rebutted, may result in liability to the negligent party."); *United States v.*

Illinois Term. RR., 501 F. Supp. 18, 20 (E.D. Mo. 1980) (lawfully erected bridge may become "an obstruction not 'affirmatively authorized by Congress.' "); *Alamo Barge Lines*, 596 F. Supp. 1026 (E.D. La. 1984) (party in violation of statute cannot invoke *The Oregon* presumption); *Central Rivers Touring*, 750 F.3d 565 (7th Cir. 1984) (bridge owner liable for conditions that unreasonably obstruct navigation); *Folkstone*, 64 F.3d 1037 (7th Cir. 1995) (bridge that impeded navigation more than necessary liable for accident).

IV. The appellate court ruling is consistent with precedent from other circuits.

Lastly, Petitioner postulates that the appellate court decision creates a conflict with two old Fifth Circuit cases, *Texas & P. Ry. v. Angola Transfer Co.*, 18 F.2d 18 (5th Cir. 1927), and *Seaboard Airline R.R. v. Pan Am. Petro. & Transp.*, 199 F.2d 761 (5th Cir. 1952). Even assuming that cases almost 70 and 50 years old, respectively, could suggest an inter-circuit conflict, the appellate decision at issue here is not in conflict with the Fifth Circuit. First, as the opinion below noted, neither of the Fifth Circuit cases cited or even discussed the Truman-Hobbs Act. In fact, *Angola Transfer* was decided before the Truman-Hobbs Act became law. Second, as discussed below, the cases are factually distinguishable and legally anachronistic.

Petitioner contends that *Angola Transfer* stands for the proposition that the construction of a bridge according to its original plans negates the possibility of a bridge becoming an unreasonable obstruction as a matter of law (Petitioner Pet. at 4). The facts of this 73 year-old case are

readily distinguishable from the case at bar. Unlike the bridge here, the Coast Guard had not declared the bridge in *Angola Transfer* an unreasonable obstruction to navigation. After a vessel struck the bridge in *Angola Transfer*, the vessel owner argued that the *initial construction* was improper, but the court rejected that avenue of liability because the bridge was "conclusively proven" at trial to have been built according to plans approved by the Secretary of War. *Angola Transfer*, 18 F.2d at 19. In this case, Petitioner's liability arises not because the initial construction of the bridge created an unreasonable obstruction to navigation, but because changed river conditions over the course of 100 years – of which Petitioner was or should have been aware – required it to take corrective measures.[1] *Angola Transfer* did not exclude the potential for a finding of liability due to changed conditions, but noted that the changed conditions in that case (the "highest [river] stage ever known") had existed for only a day or two, and "[t]here was nothing to put appellant on notice that an accident was likely to happen." *Id.* at 19-20. Here, the changed conditions at Sabula had existed for decades and accidents occurred regularly every month. *Angola Transfer* is entirely consistent with established precedent: "Permission to erect such a bridge . . . does not give an indefinite right to maintain it under changed conditions. . . . Granting that the bridge involved here was a reasonable and proper obstruction when it was built, . . . it [later] became an unreasonable obstruction,

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[1] As discussed above, evidence also shows the Sabula bridge fails to conform to its permit, which further distinguishes *Angola Transfer*.

for whose existence the railroad was responsible." *Central Rivers Towing, Inc. v. City of Beardstown*, 750 F.2d 565, 569 (7th Cir. 1984).

The other case cited by Petitioner, *Seaboard Airline*, resulted in the Fifth Circuit placing full responsibility for an allision on a negligent vessel. *Seaboard Airline* is distinguishable from the case at bar and is of doubtful validity within its own circuit today. Unlike this case, the ruling in *Seaboard Airline* came after trial, at which point the Fifth Circuit noted that the evidence showed all fault should be apportioned to the vessel, which failed to exercise reasonable care in navigating the bridge. Here, trial has yet to occur, and not one shred of evidence shows that the pilot of Respondent's boat exercised imprudent seamanship.

Moreover, unlike the bridge here, the bridge in *Seaboard Airline* could be navigated safely by exercising due care ("passage can be safely made under the conditions if due care is exercised." *Id.* at 765), whereas the bridge here becomes "virtually impossible" to navigate during periods of high water (Appx. at 59-60), which existed to some degree at the time of the accident involved here (Appx. 21-22 & 88-89). Because this bridge could not be safely navigated at the time of the accident despite the use of due care, *Seaboard Airline* does not compel assessing full responsibility for this accident on Respondent.

Seaboard Airline is also of doubtful validity within its own circuit. *Seaboard Airline* applied the "active-passive" negligence doctrine then followed by most admiralty courts, and concluded that the stationary bridge there was only passively negligent, that the moving vessel was actively negligent, and the actively negligent vessel

should bear all responsibility for the accident. Comparative fault was not a recognized aspect of maritime law at the time the Fifth Circuit decided *Seaboard Airline*. The active-passive distinction in admiralty has since been rejected by the Fifth Circuit (*see, e.g., Loose v. Offshore Nav., Inc.*, 670 F.2d 493, 502 (5th Cir. 1982) ("the concepts of active and passive negligence have no place in a liability system that considers the facts of each case and assesses and apportions damages among joint tortfeasors according to the degree of responsibility of each party.") and by other circuits:

> We hold that, where the violation of a statutory duty is a cause of an accident, that liability may not be avoided on causal grounds by drawing distinctions between active and passive negligence. . . . To excuse the negligence which narrows a navigable channel would, in our opinion, simply frustrate the congressional purpose to safeguard navigation. This view accords with the rationale underlying the decision in *The Pennsylvania*, [86 U.S. 125 (1873)]. The result we reach is in accord with the decisions in *In re Wasson*, 495 F.2d 571 (7th Cir. 1974). . . .

In re tug Helen B. Moran, Inc., 560 F.2d 527 (2nd Cir. 1977). If *Seaboard Airline* were decided today, the Fifth Circuit would likely reach a different result. If presented with the facts of this case, the Fifth Circuit would almost certainly reach the same result reached by the appellate court here.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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(4)

No. 99-1904

Supreme Court, U.S.
FILED
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In The

Supreme Court of the United States

I&M RAIL LINK,

Petitioner,

v.

NORTHSTAR NAVIGATION, INC.,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

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REPLY BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

On May 5, 1997, when respondent's towboat struck the Sabula Railroad Bridge, the Bridge was in full compliance with its Coast Guard permit. The Bridge was first permitted by the United States government in 1880. It remains in compliance today. Indeed, on April 26, 1996, the Coast Guard renewed the Bridge's permit; and on May 1, 2000, the Coast Guard confirmed that the April 26, 1996 permit " ' . . . is valid and there is no action pending that requires a permit amendment.' " Pet. 7 (omission in original).

This Court's decision in *The Oregon*, 158 U.S. 186, 197 (1895), reaffirmed the common rule of admiralty that when a moving vessel allides with a stationary vessel or bridge, it is presumed that the stationary object was not at fault and that the moving vessel caused the allision. Until the court of appeals decision in this case, this presumption applied with full force where, as here, a moving vessel allides with a bridge that is in compliance with a Coast Guard permit. In the decision below, however, the Seventh Circuit held that the Sabula Bridge is not entitled to any beneficial presumption by virtue of its current and valid Coast Guard permit, because the Coast Guard had simultaneously found that the Sabula Bridge qualified as an "unreasonable obstruction to navigation" such that it was entitled to receive federal funds for bridge alteration under the Truman-Hobbs Bridge Act. See 33 U.S.C. §§ 511-523. The court believed that the Coast Guard's Truman-Hobbs findings trumped the Agency's concurrent finding embodied in the permit that the Bridge was "lawful." See 33 U.S.C. § 401. Thus, the court held, "[t]he trier of fact must give an answer [to the question whether the Sabula Bridge is legally liable for the allision at issue] *without resort to presumptions.*" Pet. App. 8 (emphasis supplied).

Plainly, the Coast Guard, which has authority both to permit bridges and to make Truman-Hobbs determinations, has harmonized the two statutory schemes that it is charged with administering. For decades, its determination that a bridge was "lawful" under section 401 has entitled the bridge both to a permit and to the beneficial presumption of *The Oregon* Rule when an allision occurs. Nothing in the history of the Truman-Hobbs Act or in the Coast Guard's administrative proceedings under that Act gives any indication that the findings prerequisite to federal funding for bridge alteration may be used to deprive a bridge of its lawful, permitted status and the common sense benefits conferred upon lawful stationary objects by *The Oregon* Rule. Nor has the Coast Guard ever taken any action that would allow the inference that Truman-Hobbs proceedings can bear such weight. Moreover, if bridge owners had believed that a Truman-Hobbs finding could sweep away *The Oregon* Rule presumption in maritime negligence cases, they would have battled mightily to avoid such a determination; yet Truman-Hobbs proceedings have never been truly adversarial.[1] Finally, the Coast Guard clearly did not consider its Truman-Hobbs findings binding in its May 1, 2000 decision that the Sabula Bridge is lawful in its present condition.[2] If the

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[1] Respondent claims that Truman-Hobbs proceedings are adversarial, citing the statutory language providing for a hearing and an appeal. *See* Opp. 11-12. This misses petitioner's point which is that these hearings generally are not contested, adversarial proceedings, but rather inquiries to determine whether federal funds should be used to alter a bridge. If federal funds came to a bridge accompanied by loss of *The Oregon* Rule presumption, bridge owners would seek to decline this "benefit," particularly since the money generally is not forthcoming for many years.

[2] The Opposition states (Opp. 12) that the Sabula Bridge permit required its owners to modify the Bridge if it became an unreasonable obstruction to navigation. Yet the Coast Guard's

Coast Guard permit is to be deprived of its established meaning and consequence, it is for the Coast Guard, which is charged with administering both the permitting and the Truman-Hobbs schemes, to say so. Yet the Agency's actions support the contrary conclusion.

We showed in the petition that the court of appeals' decision – that a Truman-Hobbs finding deprives a permitted bridge of its lawful status – is contrary to established admiralty law, ignores the purposes of the relevant statutory schemes, and conflicts with the decisions of other courts of appeals. In addition, we showed that because numerous bridges have received the Truman-Hobbs designation, the court of appeals' new rule will cause widespread harm. It will generate substantial litigation about the relative fault of lawfully permitted bridges and moving vessels in allisions; it will convert the presently non-adversarial Truman-Hobbs proceedings into pitched battles; and it will reduce vessel owners' and operators' incentives to make the most prudent navigational decisions and safety-related investments. For all of these reasons, this Court should grant the petition. In this reply, we respond briefly to respondent's unsuccessful attempts to show that review is unwarranted.

1. Respondent first seeks to persuade the Court that it is, indeed, difficult to navigate through the Sabula Bridge and, therefore, that it would be somehow unfair in this case to presume that a moving vessel approaching the stationary bridge is at fault. See, *e.g.*, Opp. 1, 3-4. There is no doubt that safe navigation of a Mississippi River bridge by a large group of vessels requires skill and judgment, and that the increasing size of vessels seeking

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May 1, 2000 decision required no modifications for the Bridge to maintain its lawful permit. Clearly, the Coast Guard does not deem the Bridge an unreasonable obstruction to navigation in any sense other than that required to support the use of federal funds in its alteration.

to navigate the River has exacerbated the inherent difficulties. That is, in part, why the Coast Guard must permit all bridges over the navigable waters of the United States. But the relative difficulty of navigating the Sabula Bridge is not the issue before this Court. The petition presents the purely legal question whether the Coast Guard's issuance of a permit to a bridge establishes the prerequisites for the invocation of *The Oregon* Rule or whether that Coast Guard's simultaneous determination that a bridge should be altered under the Truman-Hobbs Act rebuts the presumption of fault, by itself, and allows the question of negligence to go to the trier of fact. Put differently, the question is whether the Coast Guard's Truman-Hobbs findings and decisions are admissible in a maritime negligence case. This is a pure question of statutory construction that the court of appeals decided incorrectly.

2. Respondent next observes that the petition is interlocutory. That point plainly does not militate against review here for several reasons.

First, the entire point of *The Oregon* Rule and the common sense presumption of fault it establishes is to avoid costly and lengthy trials of comparative negligence where a moving vessel allides with a lawful stationary object such as a permitted bridge. Even if petitioner prevails at trial, it will not have avoided the harm caused by the court of appeals' decision; *viz.*, the loss of the presumption that the moving vessel was at fault in the allision.

Second, the rule of law imposed by the Seventh Circuit mandates trials whenever moving vessels strike permitted bridges that are also the subject of a Truman-Hobbs finding. It is this legal rule that petitioner challenges. The unquestionably time-consuming and expensive trial of relative fault in this case will add nothing of relevance to this Court's review of the question whether Truman-Hobbs findings are material in a maritime negligence case.

Third, for the reasons stated in the petition, there is substantial harm in allowing the Seventh Circuit's decision to stand. The opinion will encourage trials about the comparative negligence of moving vessels and bridges that are entitled to Truman-Hobbs funds (currently 13 bridges which have experienced over 2,000 allisions in the past ten years, Pet. 9). It may subtly increase risk-taking and reduce safety investment.[3] It also will alter entirely the character of Truman-Hobbs proceedings. In sum, there are good reasons to decide this question now.[4]

3. Respondent further argues that the court of appeals' decision will promote safety "by compelling

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[3] Respondent characterizes the argument that river boat pilots will be less careful under the court of appeals' rule as "sophistry." Opp. 7. In so doing, respondent takes a sophisticated argument, oversimplifies it, and knocks it down. Of course, pilots will do their best safely to navigate bridges, all other things being equal. But boat owners and operators will not have the same financial incentives to maximize safety, and this will show up in navigational decisions at the margins (i.e., whether to attempt to navigate a bridge during a particular wind or other under less optimal circumstances or to incur the costs of delay, or whether to invest in a certain safety-related technology or save its cost). It is naïve to say, as respondent does, that the elimination of the presumption of fault will not have adverse consequences for safe navigation of bridges.

[4] Respondent also suggests that, even apart from the Truman-Hobbs findings, it presented sufficient evidence to rebut *The Oregon* Rule. The court of appeals' opinion contains no hint of such a finding, and plainly reversed the district court's grant of summary judgment solely on the ground that the Truman-Hobbs findings rebutted the presumption that the moving vessel was at fault. The district court expressly held that "[d]efendants have also failed to rebut the presumption of negligence with evidence that the ship acted with reasonable care." Pet. App. 11. This argument is a red herring designed to distract the Court from the purely legal question presented by both lower courts' holdings.

Petitioner to rectify the extreme dangers posed by its bridge." Opp. 7. This argument simply ignores both the permit process of 33 U.S.C. § 401 and the purposes of the Truman-Hobbs Act, which respondent, of course, invokes when more convenient to its needs.

The Sabula Bridge is lawful pursuant to a Coast Guard permit. Under the statute, any alteration to its design must be approved by the Coast Guard. If the Bridge, in fact, posed an extreme danger, the Coast Guard would not permit it without requiring alteration. But, the Coast Guard has confirmed as recently as May 1, 2000 that the Bridge has a lawful permit *in its current condition*.

Moreover, as Congress recognized, alterations to railway bridges to accommodate the needs of modern commercial marine shippers do not serve the interests of the railroads that own them, but rather the interests of their competition. Congress further understood that the Federal Government has an interest in supporting the continued viability of railroads and avoiding the abandonment of railway bridges and hence rail lines. Based on concerns of fairness and in order to encourage bridge improvement without bankrupting railroads, Congress passed the Truman-Hobbs Bridge Act, which provides that the Federal Government will fund bridge improvements in significant part. See Pet. 22-27. In short, Congress has determined that *this scheme* (not individual negligence actions) is the balanced way to encourage improvements to bridges over navigable waters in the United States. Using a Truman-Hobbs finding to deprive a lawful, permitted bridge of the benefit of *The Oregon* Rule would strongly discourage bridge owners from using the Truman-Hobbs process.

Petitioner, like most owners of Truman-Hobbs bridges, is awaiting the federal funding necessary to make feasible the alteration of the Sabula Bridge. Until that point, the Coast Guard, pursuant to Congress' scheme, has determined that the Sabula Bridge is lawful,

and that Agency determination should apply in maritime negligence actions.

4. Respondent clumsily attempts to recast petitioner's argument as a contention that the Coast Guard permit "forever immunizes a bridge owner from any form of liability." Opp. 8. That is not even a remotely accurate description of either our argument or the facts. The Coast Guard re-permitted the Sabula Bridge on April 26, 1996, a year prior to the allision in question, and reconfirmed the validity of the permit on May 1, 2000. The Bridge was, accordingly, lawful and entitled to the benefit of *The Oregon* Rule at the time of the allision. Petitioner is not seeking "the blind imposition of liability against a vessel" that collides with a stationary object. *Id.* at 10. Petitioner seeks only a presumption that, as a lawful, stationary object engaged in no action (such as the lifting of a drawspan), the fault for any allision lies with the moving vessel. This presumption is deeply and firmly rooted in admiralty law and should have been applied in this case.

Similarly inapt is respondent's citation of cases standing for the proposition that a bridge owner cannot invoke *The Oregon* Rule if the permitted bridge is in violation of its permit or another law. See Opp. 8-9, 14-15. In the first cited case, the permitted bridge had not been passive, but had taken action that was not in compliance with its permit and thus removed *The Oregon* Rule presumption. See *Folkstone Maritime, Ltd.* v. *CSX Corp.*, 64 F.3d 1037, 1055 (7th Cir. 1995) (failure of the bridge to elevate to its fully-open 83 degree angle *in violation of its permit* was the sole proximate cause of the allision).[5] Most

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[5] Respondent also states incorrectly that the Sabula Bridge was not in compliance with its permit. *See, e.g.*, Opp. 12-13. Neither lower court so much as hinted that this was true, and the Coast Guard's May 1, 2000 determination is directly to the contrary.

of the citations similarly involve stationary objects in violation of the law; none involves a lawfully permitted object. See *Central Rivers Towing, Inc.* v. *City of Beardstown*, 750 F.2d 565, 568-73 (7th Cir. 1984) (holding that the city government and the United States could be liable for an accident caused by remains of bridge destroyed pursuant to government specifications if the ruins of the bridge were negligently maintained); *Alamo Barge Lines, Inc.* v. *Rim Maritime Co.*, 596 F. Supp. 1026, 1033 (E.D. La. 1984) (holding a stationary vessel liable for an allision where the vessel was illegally anchored in midchannel); *United States* v. *Illinois Terminal R.R.*, 501 F. Supp. 18, 20 (E.D. Mo. 1980) (holding that although a bridge was lawfully erected, its decaying remains were an unlawful obstruction not " 'affirmatively authorized by Congress' "); *Lauritzen* v. *Chesapeake Bay Bridge & Tunnel Dist.*, 259 F. Supp. 633, 635, 638 (E.D. Va. 1966) (holding that a state agency may be liable in admiralty law for a vessel's allision with an underwater obstruction in violation of building permit conditions and navigation laws). Cf. *Wilmington Ry. Bridge Co.* v. *Franco-Ottoman Shipping Co.*, 259 F. 166, 168-71 (4th Cir. 1919) (applying *The Oregon* Rule in favor of the bridge, but holding that the vessel had used due care and thus was not liable for the allision).[6] In contrast here, the Bridge was in full compliance with its Coast Guard permit and thus "lawful," and the lower courts found that the vessel failed to rebut the presumption of *The Oregon* Rule.

5. Finally, respondent's arguments that this case does not create a decisional conflict among the lower courts are entirely without merit.

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[6] In the remaining case cited, *Rodi Yachts, Inc.* v. *National Marine, Inc.*, 984 F.2d 880 (7th Cir. 1993), the court applied not *The Oregon* Rule, but rather the "drifting-vessel presumption," and simply questioned whether the rule was a "sensible observation" or a "presumption." *Id.* at 886.

Respondent first asserts that *Seaboard Airline Railroad* v. *Pan American Petroleum & Transport Co.*, 199 F.2d 761 (5th Cir. 1952), cannot create a conflict because the court of appeals decision does not mention the Truman-Hobbs Bridge Act by name. As we pointed out, however, the district court plainly stated that the bridge at issue was the subject of an order to alter under the Act. Pet. 27 n.5. The court of appeals held that this order was insufficient to rebut the presumption of *The Oregon* Rule, as applied to an allision between a stationary bridge with a valid permit and a moving vessel.

Respondent next tries to distinguish this case from *Seaboard Airline* on the ground that there was a trial in the latter case. That signifies only that the defendant vessel had evidence *other than the Truman-Hobbs finding* to support its denial of fault for the allision. Here the lower court properly found that the vessel had not presented other evidence to rebut *The Oregon* Rule. See *supra* note 4.

Finally, respondent argues that *Seaboard Airline* rests on a discredited "active-passive" negligence doctrine that has been displaced by the doctrine of comparative negligence. This contention, assuming its validity, would not alter the legal holding of *Seaboard Airline* – to wit, that a Truman-Hobbs order to alter does not rebut the presumption embedded in *The Oregon* Rule. The application of the doctrine of comparative evidence would change only the calculation of damages in *Seaboard Airline*, and even that effect would arise only if the vessel were able to show that the bridge was somehow responsible for the allision. It would not vitiate the conflict between the instant case and *Seaboard Airline* in the slightest.

Finally, in attempting to distinguish *Texas & Pacific Railway* v. *Angola Transfer Co.*, 18 F.2d 18 (5th Cir. 1927), respondent asserts that it could not be a true conflict because the Truman-Hobbs Act was not in effect at that time and because the bridge at issue had not been declared unlawful. Opp. 15-16. This argument misses the

point. The bridge at issue in *Angola Transfer* was built pursuant to a congressional authorization, according to plans and specifications approved by the Secretary of War; at a later date, an administrative official issued an order to renovate the bridge. The court held that approval of the construction insulated the bridge owner from allegations that the bridge was improperly constructed, despite the subsequent administrative order to renovate. Similarly here, the current Coast Guard permit makes the Sabula Bridge lawful, and that lawfulness is not affected by the Coast Guard's simultaneous issuance of a decision that the bridge is qualified to receive federal funds for alteration under the Truman-Hobbs Act.

This conflict among the courts of appeals and, indeed, on the Mississippi River itself, warrants review of the decision at issue.

CONCLUSION

For the foregoing reasons and those stated in the petition, the petition for certiorari should be granted.

Respectfully submitted,

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